SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

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SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY,
REALIS ASSOCIATES,
THE TOWN OF NORTH CASTLE,
ROBERT BURKE, TERI BURKE,
NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

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Index No. 9130/06

AFFIRMATION OF LEONARD BENOWICH IN OPPOSITION TO THE TOWN OF NORTH CASTLE'S MOTION FOR DISCONTINUANCE

Assigned Justice Rory Bellantoni

LEONARD BENOWICH, an attorney admitted to practice in the Courts of this State, affirms the following under penalty of perjury:

I. Introduction and Summary of Position

1. I am a member of Benowich Law, LLP, counsel of record for defendant The Nature Conservancy ("TNC") in this action. Unless otherwise indicated, I have personal knowledge of the facts and circumstances set forth herein and submit this affirmation in opposition to the motion by defendant, Town of North Castle ("Town"), for an order approving Plaintiff's discontinuance of its claims as against the Town.

2. The Town's motion should be denied or, alternatively, the motion should be granted subject to the following express conditions:

First, the Court's Preliminary Injunction shall remain in full force and effect;

Second, no person may or shall open or remove the Gate, except by order of this Court;

Third, the Town shall remain subject to discovery by the non-settling Defendants, and

shall be required to provide discovery to the non-settling Defendants as if it were still a party to this action, and any and all demands for information by the non-settling Defendants shall be served on the Town's counsel;

Fourth, the Town and/or its counsel shall (a) inform the non-settling Defendants of each and every request for information received from Plaintiff, (b) provide the non-settling Defendants with a copy of any and all documents, materials or statements which are provided or made available to Plaintiff or its counsel, and (c) provide the non-settling Defendants with the name of each Town officer, employee or other person consulted or made available to Plaintiff in connection with any request for information by Plaintiff; and

Fifth, Plaintiff shall be precluded from using on any motion, or offering or introducing at trial, any evidence obtained directly or indirectly from the Town which has not been provided to the non-settling Defendants in accordance with these conditions.

II. Discussion

3. The question whether to allow a plaintiff to discontinue its claims against less than all defendants in an on-going case is subject to the Court's broad discretion, and discontinuance may be denied where, as here, there will be prejudice to the non-settling Defendants.

4. CPLR 3217(b) provides that the Court may direct the discontinuance of a claim "upon terms and conditions" deemed appropriate by the Court:

> Except as provided in subsection (a), an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper.

5. For the following reasons, if the Court determines to permit the discontinuance, the Town should be required to provide discovery and other materials to all parties on an even-handed basis.

6. The Town argues that the non-settling Defendants will not be prejudiced if Plaintiff's claims against the Town are discontinued. The Town is wrong, for several reasons.

7. *First*, it appears that the Town has paid dearly to have Plaintiff discontinue its claims in this case. Unlike the more commonplace settlement provisions, in which the parties neither admit nor deny liability to the other, here the Town is abdicating the very positions it has taken not only in this litigation but as a matter of its public conduct.

8. It was the Town, for example, that installed the Gate in 1990, having determined that Oregon Road was abandoned;[1] and the Town had taken the position that Plaintiff had no rights to use Oregon Road. For the almost 20 years since then, the Town plainly defended the propriety of its actions and conduct in installing the Gate, and its belief and unquestioned assumption that it had obtained the consent of all parties - including Plaintiff's predecessor, Rockefeller University - to do so. Now, as a part of its bargain with Plaintiff, the Town has been forced to agree "that it will not contest Plaintiff's position that it has easement rights over Oregon Road" (Town Ex. 1, Stip., III (a)); and to "support the use of Oregon Road as a gated private road providing sole access to Plaintiff's North Castle property." (*Id.*, Stip., III (b))

9. The assurances running from the Town to Plaintiff in their settlement agreement make a mockery of the Town's prior public positions and its positions in this case, and they

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[1] *See* the Town's Certificate of Discontinuance of a Portion of Oregon Road, annexed as **Exhibit 1.**

prejudice the non-settling Defendants' ability to rely on the Town's prior actions. In short, the settlement agreement between Plaintiff and the Town eviscerates the Town's public actions and its positions taken in this litigation.

10. *Second*, the Town has already played favorites - favoring Plaintiff over its erstwhile co-defendants. For example, although the Town has pledged to "provide reasonable cooperation to Plaintiff in connection with the on-going litigation against the remaining Defendants, including during the discovery process currently in progress" (*id.*, Stip., III(c)), the Town has been less than even-handed with the non-settling Defendants. As the Court will recall, when we appeared in Court on March 31, 2009, the Town vociferously objected to providing TNC with any responses to TNC's supplemental discovery requests. When the Town did provide responses, they were perfunctory[2] and evasive or incomplete;[3] and, even worse, failed to comply with the requirements of CPLR 3133 - in that they were not signed by an officer or

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[2] Copies of the Town's Interrogatories, **Exhibit 2**, and Responses to TNC's discovery demands, **Exhibit 3**, are annexed. The Responses were prepared by the Town's attorneys, and apparently the Town itself had no input in, or involvement with, the preparation or even the review and execution of these Responses.

[3] For example, in response to TNC's request that the Town identify witnesses with knowledge of the facts relating to this case, the Town responded with the following useless response: "Individual(s) from the Town of North Castle Highway Department." (*See* Ex. 3, Response to Demand for Witnesses) Witnesses are to be identified so that they can be called to testify at a deposition or at trial. This response demonstrates that the Town and its cousnel have not performed the minimal work necessary to respond to what is otherwise a basic discovery demand.

This is in marked contrast to the Town's obligation - and apparent willingness - to cooperate with Plaintiff.

employee of the Town.[4] In short, the interrogatory responses were useless, as was the Town's failure to identify its witnesses; and this provides further evidence that the Town is not likely to be even-handed with all parties when it comes to providing access to the Town's information.

11. Given the circumstances under which the Town had to sue - *i.e.* beg - for peace and to be let out of this case and another action,[5] this Court should not simply allow the Town to be released from this action unless the Town is, at the very least, obligated to be even-handed with respect to discovery and all related matters.

12. The Second Department has repeatedly recognized that it is error to allow even voluntary discontinuance of claims when the effect is to excuse a party from its discovery

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[4] The Town's Interrogatories were initially signed by the Town's outside counsel, and not by any Town official or employee. It was only after TNC objected to the Town's failure to comply with its basic discovery obligations (and after the Town made this motion) that the Town's supervisor, Reese Berman, verified the Town's Interrogatories.

[5] *Seven Springs, LLC v. The Town of North Castle*, Index No. 5484/08, in which Seven Springs sued the Town for more than $300 million in compensatory damages, and another $300 million in punitive damages, simply because the Town: (a) "has taken, and continues to take, the position that Plaintiff has no right to access the Seven Springs Parcel from the south over Oregon Road" (Complaint, ¶24, annexed as **Exhibit 4**); and (b) "through its elected officials, has in the past unlawfully, wrongfully, and improperly collaborated with, and continues to unlawfully, wrongfully and improperly collaborate with, private parties in a joint effort to deprive Plaintiff of its right to access the Seven Springs Parcel, and to hinder, delay and/or preclude development of the Seven Springs Parcel." (*Id.*, ¶28)

In short, Plaintiff sued the Town for $600 million - simply because the Town had the temerity to defend its actions taken in 1990 and to wait for this Court to determine whether Plaintiff actually has the easement or access rights it seeks to have declared in this action.

While discontinuance of Plaintiff's claims against the Town may (or may not) reduce the Town's costs of defending this action, such discontinuance is at great cost to the Town and the non-settling Defendants, and it is nothing but a reward to Plaintiff for having engaged in "economic terrorism" as Mr. Kirkpatrick characterized the other suit during the March 31 proceedings (at page 31).

obligations or its obligations under court orders. See e.g. *Kaplan v. Village of Ossining*, 35 A.D.3d 816 (2nd Dep't 2006), *citing Venture I, Inc. v. Voutsinas*, 8 A.D.3d 475 (2nd Dep't 2004); *Casey v. Custom Crushing & Materials*, 309 A.D.2d 726, 727 (2nd Dep't 2003); *Schachter v. Royal Ins. Co. of America*, 21 A.D.3d 1024 (2nd Dep't 2005); *Schneider v. Schneider*, 32 A.D.2d 630 (1st Dep't 1969); *Autz v. Fagan*, 16 Misc. 3d 1140(A) (Sup. Ct. Nassau Co. 2007).

13. The fact that the Town has agreed to cooperate with Plaintiff in discovery in this case, while it has simply failed and refused to honor its statutory discovery obligations in responding to TNC's discovery demands, makes plain that the price of the Town's "voluntary discontinuance" was interference with the non-settling Defendants' rights to seek and their ability obtain discovery from the Town.

III. Conclusion

14. For the foregoing reasons, we respectfully request that the Town's motion be denied in all respects, or granted only on the conditions set forth above. A proposed form of order is annexed as **Exhibit 5.**

Dated: May 5, 2009

Leonard Benowich

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EXHIBIT 5 TO BENOWICH AFFIRMATION - CERTIFICATE OF DISCONTINUANCE

CERTIFICATE OF DISCONTINUANCE
OF A PORTION OF ~~OREGON ROAD~~
SITUATED IN THE TOWN NORTH CASTLE

TO: The Town Board of the Town of North Castle
County of Westchester
State of New York

The undersigned presents this certificate and requests that a portion of the town road, known as Oregon Road, be closed at the point designated as "Pole 40" as is more particularly described on a map attached hereto and made a part hereof as Schedule "A".

This request for this partial closure of Oregon Road is based upon the following:

1. The portion of the road being closed (that portion of Oregon Road situated in the Town of New Castle shall also be closed) is no longer used by the public for travel.

2. The area, being remote, is used illegally to dump litter, fill and other undesirable material in violation of local and state laws.

3. The maintenance of the road is a waste of public funds.

4. The affected property owner, The Rockefeller University, has consented to the closing and has adequate ingress and egress to its property by alternative means.

Norman Anderson
Highway Foreman

cc: Leo Gustavson
Building & Engineering Department

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

Index No.: 9130/06

- against -

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

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DEFENDANT'S (TOWN OF NORTH CASTLE) RESPONSE TO THE NATURE CONSERVANCY'S INTERROGATORIES

1. State in detail all circumstances surrounding each and every instance when Plaintiff (or anyone acting on its behalf) used, or sought to use, Plaintiff's purported easement over the subject portion of Oregon Road, and for each instance state:

   a. The name of the person or entity in each such instance;

   b. The date of each such instance;

   c. The purpose of each such instance; and

   d. Whether, in each such instance, the use of the purported easement was by pedestrian and / or vehicular use.

   The Town of North Castle is unaware of the details of any specific instances where Plaintiff or anyone on Plaintiff's behalf used or sought to use the subject portion of Oregon Road. However, on information and belief based upon correspondence from the Town's Wetland Consultant, in or about March 2008, there was shrub and sapling removal as well as cutting of dead trees along both sides of the closed portion of Oregon Road. See letter attached hereto at Exhibit 1.

2. State the date when Oregon Road was first used as a public street, road or highway.

The Defendant is unsure of the exact date Oregon Road was first used as a public street, road or highway, but upon information and belief, it was at least since 1970.

3. State in detail all facts known to or believed by North Castle with respect to whether Oregon Road had been used as a public street, road or highway at any time prior to, during or after the time when Eugene Meyer first acquired any parcel of land which is included in either the Seven Springs Parcel or the Nature Conservancy Parcel.

See response to #2, above. See also documents annexed hereto as Exhibit 2.

4. Do you contend that Oregon Road was in use as a public highway on or about:

a. In January 1973?
Yes

b. In May 1973?
Yes

c. In April 1984?
No

d. In December 1995?

No

5. Unless your response to Interrogatory 10 [sic] is, in each instance, an unqualified "no," describe in detail all facts known to or believed by North Castle which tend to support or contradict the contention that Oregon Road was in use as a public highway, road or street:

a. At any such time, and
b. At any time between January 1973 and the date of your response to this interrogatory.

Oregon Road had been a public road that ran between the Town of North Castle and the Town of New Castle. It had not been used as a highway since

approximately 1980. In May 1990 the Town Board for the Town of North Castle unanimously voted to close Oregon Road, file a Certificate of Discontinuance and order a gate large enough to close the road. On May 10, 1990 a Certificate of Discontinuance was filed with the North Castle Town Clerk's office. The certificate was filed pursuant to §205 of the Highway Law and expressly stated that Oregon Road was no longer being used for public travel, that it was being used to illegally dump undesirable material, that maintaining the road was a waste of public funds and that the affected property owner (Rockefeller University) had consented to the closure.

6. State the date when Oregon Road ceased being used as a public street, road or highway.

The Defendant is unsure of the exact date Oregon Road ceased being used as a public street, road or highway, but upon information in belief it was in or about 1980.

7. Do you contend that any person or entity, other than the Plaintiff, has any easement or right-of-way over any portion of lands owned by The Nature Conservancy?

The Defendant does not take a position on this issue one way or another.

8. Unless your response to Interrogatory 7 is an unqualified "no," state in detail each person or entity (or class of persons or entities) who have any such easement or right-of-way, and for each such person or entity (or class of persons or entities) describe in detail the rights each such person or entity (or class of persons or entities) has in and to over any such lands owned by The Nature Conservancy.

See response to #7 above.

9. Unless your response to Interrogatory 7 is an unqualified "no," state in detail the manner in which, and the date when, each other person or entity (or class of persons or entities) who you contend has any such easement or right-of-way acquired such easement or right-of-way over any such lands owned by The Nature Conservancy.

See response to #7 above.

10. Do you contend that the "barrier" or "gate" described in paragraph 41 of the Complaint is locked?

Yes.

11. Unless your response to Interrogatory 10 is an unqualified "no," state whether Plaintiff has a key to (or the combination, or other ability with which to open) the lock.

Upon information and belief, the Plaintiff does not have the ability to open the lock.

12. Has Plaintiff, or anyone acting on its behalf, requested a key to (or the combination, or other ability with which to open) the lock on the "barrier" or "gate," and if so, identify the person who made each such request and the date of each such request.

Upon information and belief, neither the Plaintiff, nor anyone acting on its behalf, has made any such request.

13. Identify all persons who supplied any information used to prepare North Castle's responses hereto and for each such person identify the information supplied or attach a copy thereof to your responses to these interrogatories.

Records from the Town Hall, Town of North Castle and the files of Stephens, Baroni, Reilly & Lewis were used to prepare these responses.

Dated: April 6, 2009
White Plains, New York

Yours, etc.

STEPHENS, BARONI, REILLY & LEWIS, LLP

By: Kristen L. Cinque, Esq.
Attorneys for Defendant, Town of North Castle
Northcourt Building
175 Main Street, Suite 800
White Plains, NY 10601
(914) 761-0300

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

Index No.: 9130/06

- against -

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

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Defendant, Town of North Castle, by and through its attorneys, Stephens, Baroni, Reilly and Lewis, LLP, hereby responds to The Nature Conservancy's Combined Demands dated March 17, 2009. In doing so, the Defendant does not waive, but on the contrary reserves:

(1) all questions as to the competency, relevancy, materiality, privilege and admissibility as evidence for any purpose, at any trial or hearing in this case, or in any related or subsequent action or proceeding, of any information disclosed or documents produced hereunder or the subject matter thereof;

(2) the right to object on any ground to the use of any of the information disclosed herein or any of the documents produced hereunder or the subject matter thereof at any trial or hearing in this case or in any related or subsequent action or proceeding;

(3) the right to object on any ground at any time to any other document requests; and

(4) the right at any time to revise, supplement or correct the responses and objections provided herein.

GENERAL OBJECTIONS

1. Defendant Town of North Castle objects to The Nature Conservancy's Demands relating to document requests to the extent that it seeks information that is protected

by the attorney/client privilege, attorney work product doctrine or any other applicable New York State privilege or doctrine.

2. Defendant Town of North Castle objects to The Nature Conservancy's Demands to the extent that it seeks to impose or imply the existence of facts or circumstances which did not or do not exist.

3. Defendant objects to The Nature Conservancy's Document Request to the extent it calls for the production of documents regarding matters that are not relevant to the subject matter involved in this action and/or documents that are not reasonably calculated to lead to the discovery of admissible evidence.

4. Defendant objects to The Nature Conservancy's Document Request to the extent it seeks to impose obligations greater than that imposed by the applicable Civil Practice Laws and Rules.

5. Defendant Town of North Castle objects to The Nature Conservancy's Demands to the extent it is overly burdensome, overly broad, vague and/or ambiguous or requires the Defendant to make a determination as to what information is being sought.

6. Defendant objects to The Nature Conservancy's Document Request to the extent it seeks documents not currently within the Defendant's possession, custody or control.

7. Defendant objects to The Nature Conservancy's Document Request to the extent that it seeks to impose or imply legal conclusions.

8. In the event that the Defendant discovers that all responsive documents have not been located and identified, Defendant reserves the right to assert additional objections to production as appropriate.

9. Defendant incorporates the foregoing General Objections into the responses to each and every request.

10. Defendant reserves the right to revise, amend and / or supplement these responses and objections.

RESPONSE TO THE NATURE CONSERVANCY'S DEMAND FOR STATEMENTS PURSUANT TO CPLR §3101(e)

Defendant Town of North Castle objects to this demand to the extent it is overly burdensome, overly broad, vague and/or ambiguous or requires the Defendant to make a determination as to what information is being sought. Defendant Town of North Castle further objects this demand to the extent that it seeks information that is protected by the attorney/client privilege, attorney work product doctrine or any other applicable New York State privilege or doctrine. Without waiving said objections, the Defendant Town of North Castle is unaware of any such statements.

RESPONSE TO THE NATURE CONSERVANCY'S DEMAND FOR WITNESSES

1. Identify by name and address all persons claimed to be witnesses to each claim or occurrence alleged in the Complaint (and any other pleading in this action), to have first-hand knowledge of each claim or occurrence set forth in the Complaint (and any other pleading in this action), or the facts and circumstances surrounding each claim or occurrence set forth in the Complaint (and any other pleading in this action).

Individual(s) from the Town of North Castle Highway Department
21 Bedford Road
Armonk, New York 10504

David Sessions, AICP
Kellard-Sessions Consulting, P.C.
500 Main Street
Armonk, New York 10504

Donald Trump
c/o The Trump Organization
725 Fifth Avenue
New York, New York 10002

2. Identify by name and address each witness having knowledge of any alleged act, wrongful act, calculation error, breach of contract, error, act omission committed or omitted with regard to each claim or occurrence set forth in the Complaint (and any other pleading in this action), or the facts and circumstances surrounding each claim or occurrence set forth in the Complaint (and any other pleading in this action) by: (a) any of the plaintiffs; (b) any of the defendants; or (c) any person not party to this action.

See response to #1, above.

3. Identify by name and address any person having knowledge with respect to any conversation, communications or writings with respect to the circumstances or events referred to in this action as set forth in the Complaint (and any other pleading in this action).

See response to #1, above.

4. With respect to all expert witnesses who will be used at the trial of this matter, demand is hereby made that pursuant to CPLR §3101(d) you provide the following:

    a. The name of each expert witness.

    b. The qualification of each expert witness.

    c. A summary of expected testimony of each expert witnesses, including, but not limited to:

        i. Summary of the facts relied on by the expert;

ii. Summary of the expert's opinions, and

iii. Summary of the grounds for the expert's opinions.

The Defendant, Town of North Castle objects to this demand as it is premature at this time. Notwithstanding this objection, and without waiving same, the Defendant has yet to retain the services of any expert(s) to testify at trial. Should Defendant retain such an expert, the requested information will be provided.

RESPONSE TO PLAINTIFF'S DEMAND FOR DISCOVERY AND INSPECTION OF DOCUMENTS PURSUANT TO CPLR §3120

1. See title reports / title searches annexed hereto as Exhibit 1. See also documents annexed to the Defendant's Response to Interrogatories at Exhibit 2.

2. The Defendant objects to this request as it is overly burdensome, calls for information not normally within this Defendant's possession and because this information is equally accessible to The Nature Conservancy. Without waiving said objections, the Defendant directs The Nature Conservancy's attention to the documents annexed to the Defendant's Response to Interrogatories at Exhibit 2.

3. The Defendant objects to this request as it is overly burdensome, calls for information not normally within this Defendant's possession and because this information is equally accessible to The Nature Conservancy. Without

waiving said objections, the Defendant directs The Nature Conservancy's attention to the documents annexed hereto at Exhibit 2. See also documents annexed to the Defendant's Response to Interrogatories at Exhibit 2.

4. The Defendant objects to this request as it is overly burdensome, and because this information is already within The Nature Conservancy's possession. Without waiving said objections, the Defendant directs The Nature Conservancy's attention to the documents annexed hereto at Exhibit 3.

5. The Defendant objects to this request as it is overly burdensome, and because this information is already within The Nature Conservancy's possession. Without waiving said objections, the Defendant directs The Nature Conservancy's attention to the documents annexed hereto at Exhibit 4. See also documents annexed to the Defendant's Response to Interrogatories at Exhibit 2.

6. The Defendant objects to this request as it is overly burdensome, and because this information is already within The Nature Conservancy's possession. Without waiving said objections, the Defendant directs The Nature Conservancy's attention to the documents annexed in response to #5, above.

7. The Defendant objects to this request as it is overly burdensome, and because this information is already within The Nature Conservancy's possession. Without waiving said objections, the Defendant directs The Nature Conservancy's attention to the documents annexed in response to #5, above.

8. The Defendant objects to this request as it is overly burdensome, and because this information is already within The Nature Conservancy's possession.

Without waiving said objections, the Defendant directs The Nature Conservancy's attention to the documents annexed hereto at Exhibit 5. See also documents annexed to the Defendant's Response to Interrogatories at Exhibit 1 and the excerpts from the Environmental Impact Statements annexed in response to #5, above.

9. The Defendant is not in possession of any such documentation.

10. The Defendant objects to this request as it is overly burdensome, and because this information is already within The Nature Conservancy's possession. Without waiving said objections, the Defendant directs The Nature Conservancy's attention to the response at #8, above.

11. The Defendant objects to this request as it is overly burdensome, and because this information is already within The Nature Conservancy's possession. Without waiving said objections, the Defendant directs The Nature Conservancy's attention to the documents annexed hereto at Exhibit 3, above.

Dated: April 7, 2009
White Plains, New York

Yours, etc.

STEPHENS, BARONI, REILLY & LEWIS, LLP

By: Kristen L. Cinque, Esq.
Attorneys for Defendant, Town of North Castle
Northcourt Building
175 Main Street, Suite 800
White Plains, NY 10601
(914) 761-0300

To:

Benowich Law, LLP
ATTN: Mr. Len Benowich, Esq.
Attorneys for the Nature Conservancy
1025 Westchester Avenue
White Plains, New York 10604

DelBello, Donnellan, Weingarten, Wise & Wiederkehr, LLP
ATTN: Mr. Bradley Wank, Esq.
Attorneys for Plaintiff
One North Lexington Avenue
White Plains, New York 10601

Oxman, Tulis, Kirkpatrick, Whyatt & Geiger
ATTN: Ms. Lois Rosen, Esq.
Attorneys for Mr. & Mrs. Burke
and Mr. & Mrs. Donohoe
120 Bloomingdale Road
White Plains, New York 10601

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE TOWN OF NORTH CASTLE,

Defendant.

Index No. 05484-08
Date Filed: 3/14/08

SUMMONS

TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiffs Attorney(s) within twenty (20) days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York). In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Plaintiff designates Westchester County as the place of trial. The basis of venue is the Defendant is situated in the County of Westchester.

Dated: White Plains, New York
March 14, 2008

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

By: ALFRED E. DONNELLAN, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

TO: THE TOWN OF NORTH CASTLE
15 Bedford Road
Armonk, New York 10504

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE TOWN OF NORTH CASTLE,

Defendant.

----------X

Index No. 05484-08
Date Filed: 3/14/08

COMPLAINT

Plaintiff, Seven Springs, LLC, by its attorneys, DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP, for its complaint against defendant, The Town of North Castle, alleges, upon information and belief, as follows:

1. Seven Springs, LLC ("Seven Springs") is a New York Limited Liability Company duly organized under the laws of the State of New York, and having a principal place of business at c/o The Trump organization, 725 Fifth Avenue, New York, New York 10022.

2 The Town of North Castle is a governmental subdivision of The State of New York, which has been organized and exists under and pursuant to the laws of the State of New York, and is located in Westchester County.

3. Seven Springs is the owner of a parcel of property (the "Seven Springs Parcel") comprising approximately 213 acres, and known on the tax assessment map of the Town of New Castle, County of Westchester as Section 94 17, Block 1, Lots 8 and 9, on the Tax Assessment Map of the Town of North Castle as Section 2, Block 6, Lots 1 and 2, and on the Tax Assessment Map of the Town of Bedford as Section 94 18, Block 1, Lot 1 and Section 94.14, Block 1, Lot 9.

4. Seven Springs acquired title to the Seven Springs Parcel from The Rockefeller University by deed dated December 22, 1995 and recorded in the Westchester

County Clerk's Office on December 28, 1995 in Liber 11325 Page 243, which deed more particularly describes the Seven Springs Parcel

5. Rockefeller University acquired title to the Seven Springs parcel from Seven Springs Farm Center, Inc. by deed dated April 12, 1984 and recorded in the Westchester County clerk's office on May 24, 1984 in liber 7923 page 639.

6. Seven Springs Farm Center, Inc. acquired title to the Seven Springs Parcel from Yale University pursuant to deed dated March 23, 1973 and recorded March 27, 1973 in liber 7115 page 592.

7. Yale University acquired title to the Seven Springs Parcel from the Eugene and Agnes E. Meyer Foundation (the "Foundation") pursuant to deed dated January 19, 1973 and recorded in the Westchester County Clerk's office on March 27, 1973 in liber 7115, page 577.

8. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

9. As of 1973, and for some time prior thereto, Eugene Meyer, Jr. ("Meyer") was the owner of certain lands located in the County of Westchester and State of New York.

10 Included in these lands owned by Meyer was the Seven Springs Parcel as well as certain real property which would ultimately become the property of The Nature Conservancy (the "Nature Conservancy Property").

11. The Nature Conservancy Property and the Seven Springs Parcel was part of certain lands acquired over time by Meyer.

12. The Nature Conservancy acquired title to the Nature Conservancy Property from the Foundation by deed dated May 25, 1973 and recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

13. The Nature Conservancy Property is situated in the Towns of North Castle and New Castle, County of Westchester and is more particularly described in the aforesaid deed recorded in the Westchester County Clerk's office on May 30, 1973 in liber 7127 page 719.

14. The December 22, 1995 deed from the Rockefeller University referred to above, and the prior deeds thereto, conveyed fee simple absolute in the premises described therein together with the land lying in the bed of any streets and roads abutting the premises to the center lines thereof.

15 The Seven Springs Parcel has at all times abutted, and continues to abut, Oregon Road.

16. By reason of the foregoing and the December 22, 1995 Deed recorded in liber 11525 page 243 and the May 25, 1973 deed recorded in liber 7127 page 719, and the prior deeds thereto, and the facts herein set forth, Plaintiff has fee title in and to the one-half portion of Oregon Road, as same street/roadway abuts said property on its westerly side, and has a right of way and/or easement of no less than 50 feet in width to use that portion of Oregon Road abutting the Seven Springs Parcel, and that portion of Oregon Road, more particularly identified and highlighted (the "Easement" or "Easement Area") on Exhibit "A", southerly to and from the Seven Springs Parcel to the public portion of Oregon Road, for ingress and egress, and for pedestrian and vehicular access. Annexed hereto as Exhibit "A", and made a part hereof, are copies of a portion of the Official Map of the Town of North Castle adopted by the Town Board on October 23, 1997 and portion of the official tax map of the Town of North Castle as of July 18, 1986.

17 At some point in time prior to 1973 Oregon Road became a public highway by virtue of its having been used as a public highway for a period of 10 years.

18. In or about 1990 the Town Board of the Town of North Castle purportedly closed a portion of Oregon Road pursuant to Highway Law § 205 as it was no longer used for public travel.

19. The said portion of Oregon Road referred to herein that was purportedly closed and that is referred to on Exhibit "A" "ends" at its southerly terminus, at the portion of Oregon Road, a legally opened public street, that has been improved and paved.

20. That Defendant Town of North Castle has no fee interest in or right of user over that portion of the said allegedly closed portion of Oregon Road as described above, to the exclusion of Plaintiff's right, title and interest in and to Oregon Road.

21. Defendant caused at some point in time to be erected and thereafter maintained a barrier on Oregon Road at or near the point designated as "Pole 40" and where the road abuts the public portion of Oregon Road, a barrier consisting of a gate (the "Gate") thereby partially blocking and obstructing access to or from Oregon Road to the south by persons in vehicles and depriving Plaintiff, Plaintiff's visitors, trades people and vehicles and the like their lawful right to pass unimpeded over the road and to have ingress and egress over the road to and from the Seven Springs Parcel to or from the publicly opened section of Oregon Road.

22. Plaintiff has sought to develop the Seven Springs Parcel, and in connection with the development submitted various plans and proposals to the Planning Board of Defendant and to the Planning Board of the Town of Bedford.

23. In order to develop the Seven Springs Parcel pursuant to certain plans and proposals the Town of Bedford Planning Board has required, among other things, that Plaintiff have secondary access to the Seven Springs Parcel.

24. That Defendant has taken, and continues to take, the position that Plaintiff has no right to access the Seven Springs Parcel from the south over Oregon Road.

25. That the Gate is an unlawful encroachment and obstruction upon the Plaintiff's Easement as aforesaid and has caused and will continue to cause damage to the Plaintiff by reason of Plaintiff's inability to have direct access to the Seven Springs Parcel unimpeded from the south.

26. That by reason of the Gate as aforesaid, the Plaintiff has been and will in the future be deprived of the full use and enjoyment of the Seven Springs Parcel and Plaintiff has thereby suffered and will in the future suffer damages thereby.

27. That the Plaintiff has notified the Defendant that the Gate obstructs direct access to the Seven Springs Parcel from the south, has demanded that Defendant remove the Gate, and the Defendant has failed to remove the same.

28. That Defendant, through its elected officials, has in the past unlawfully, wrongfully and improperly collaborated with, and continues to unlawfully, wrongfully and improperly collaborate with, private parties in a joint effort to deprive Plaintiff of its right to access the Seven Springs Parcel, and to hinder, delay and/or preclude development of the Seven Springs Parcel.

29. Upon information and belief, said Defendant's acts are willful, without reasonable or probable cause and are without basis in law or fact.

30. That the injuries complained of are consistent and continuous and Plaintiff has suffered and will suffer injury, which injury will be continuous, and that to obtain any redress the Plaintiff will necessarily be involved in continued litigation with the Defendant and will suffer continuing damages.

31. That on or about February 13, 2008 a Decision was issued by the Appellate Division, Second Department in the matter entitled Seven Springs, LLC v. The Nature Conservancy, et al., (NYAD 2d Dept, 2008 NY Slip Op. 01327).

32. That the Decision provides in pertinent part that "the abandonment of a public highway pursuant to Highway Law § 205 does not serve to extinguish private easements, as Highway Law § 205 does not provide for compensation to the owners of any private easements that would be extinguished. (Citations omitted)". That by reason of the foregoing Decision it has been judicially determined that Defendant never extinguished the Easement pursuant to Highway Law § 205.

33. It has been acknowledged in prior Court proceedings by the Town of North Castle that, upon the closing of Oregon Road for public purposes, title reverted to Rockefeller University (Plaintiff's predecessor in interest) upon the closure.

34. By reason of the foregoing, North Castle has no legal interest in and to the private use of the Easement Area by the private persons entitled to the benefits of the Easement, no claim to public use of the Easement Area or any claim of any kind or nature with regard to the Easement, no basis in law or fact to advance any claim with regard to the Easement and use of the Easement Area by the Town of North Castle, in its capacity as a municipal corporation, or by residents of the Town or the public generally, and no basis in law or fact to maintain the Gate on or over Oregon Road, or prevent or attempt to prevent Plaintiff from having unobstructed access to the Seven Springs Parcel over Oregon Road

35. As a result of Defendant's actions Plaintiff has been, and will in the future be, deprived of the full use and enjoyment of the Seven Springs Parcel, and the value of the Seven

Springs Parcel has been greatly diminished, and Plaintiff has suffered and will in the future suffer damages thereby.

36. By virtue of the foregoing Plaintiff has been damaged in an amount to be determined at trial but not less than $300,000,000.00.

37. By virtue of Defendant's unlawful, improper and intentional acts, Plaintiff should be awarded punitive damages in an amount to be determined at trial but not less than $300,000,000.00.

WHEREFORE, Plaintiff demands judgment:

(a) That Plaintiff have Judgment for damages against Defendant an amount to be determined at trial but not less than $300,000,000.00, with interest thereon and attorneys fees, for the injuries suffered as herein alleged

(b) That Plaintiff have Judgment for punitive damages against Defendant in an amount to be determined at trial but not less than the amount of $300,000,000.00, with interest thereon.

(c) That the Plaintiff have such other, further and different relief as to the Court may seem just, equitable and proper, together with the costs and disbursements of this action.

Dated: White Plains, New York
March 14, 2008

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff

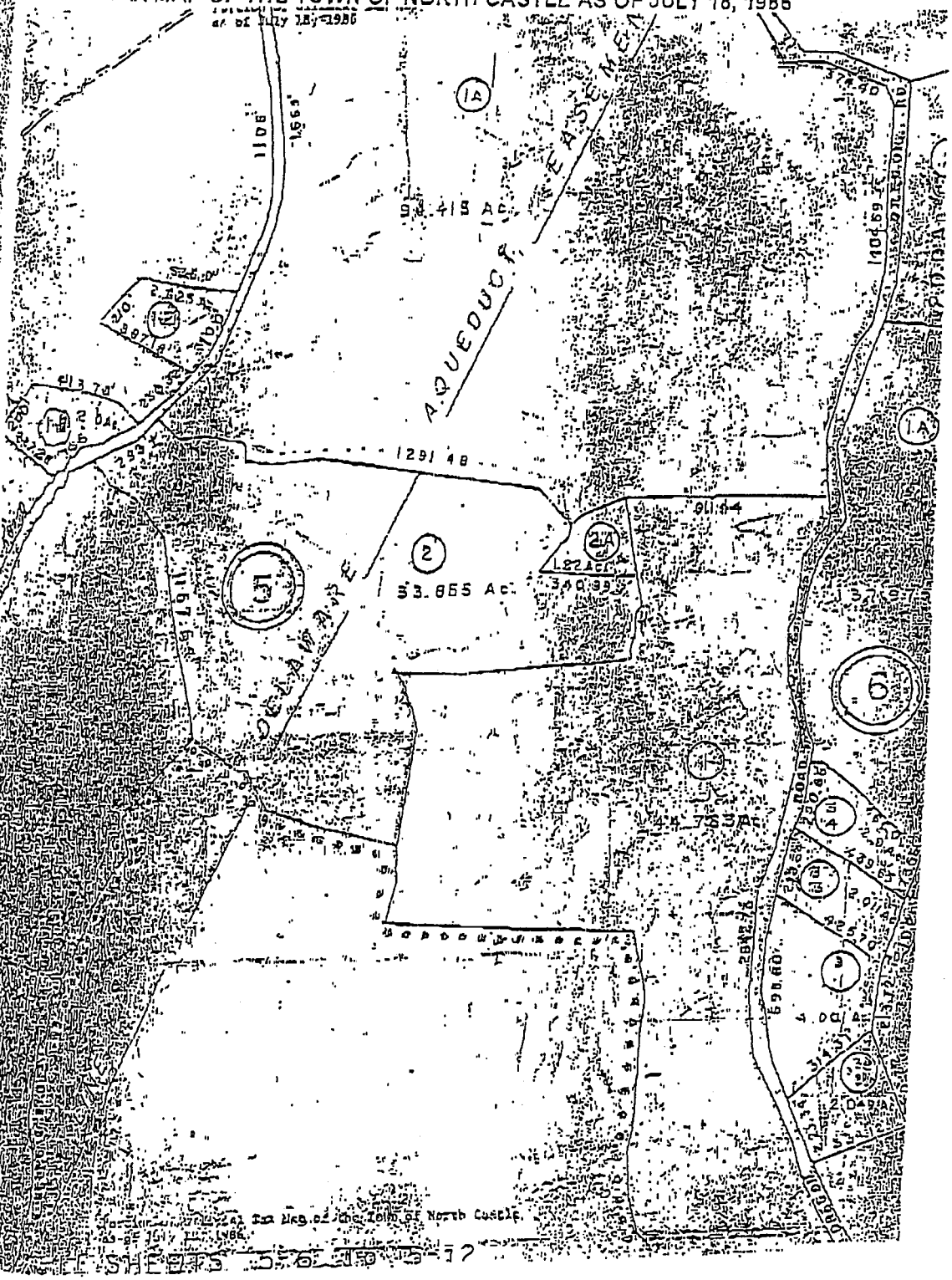
By: ALFRED E. DONNELLAN, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

124067/
0145309-001

EXHIBIT A

Portion of official Map of the Town of North Castle adopted by the Town Board on October 23, 1997

EXHIBIT A TO COMPLAINT -
PORTION OF THE OFFICIAL MAP OF THE TOWN OF NORTH CASTLE ADOPTED BY THE TOWN BOARD ON OCTOBER 23, 1997 AND PORTION OF THE OFFICIAL TAX MAP OF THE TOWN OF NORTH CASTLE AS OF JULY 18, 1986



5

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

----------x

SEVEN SPRINGS, LLC,

Index No. 9130/06

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OR NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------x

AFFIRMATION OF LEONARD BENOWICH IN OPPOSITION TO THE TOWN OF NORTH CASTLE'S MOTION FOR DISCONTINUANCE

Benowich

BENOWICH LAW, LLP
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400
Attorneys for Defendant The Nature Conservancy

To

Service of a copy of the within is hereby admitted.

Dated: .....

Attorney(s) for .....

staple here

staple here

1. Place cover this side up on top of first page of document. Staple as indicated.

2. Lift bottom of cover up and over top, folding on top score line

3. Fold cover down behind papers on remaining score line.

Blumberg's Law Products ®

STATE OF COUNTY OF ss.:

I, the undersigned, an attorney admitted to practice law,

Check Applicable Box

☐ **Certification By Attorney** certify that the within has been compared by me with the original and found to be a true and complete copy.

☐ **Attorney's Affirmation** state that I am the attorney(s) of record for in the within action; I have read the foregoing and know the contents thereof: the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true. The reason this verification is made by me and not by

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

I affirm that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF COUNTY OF ss.:

I, being duly sworn, depose and say: I am

Check Applicable Box

☐ **Individual Verification** the in the within action: I have read the foregoing and know the contents thereof: the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

☐ **Corporate Verification** the of a corporation and a party in the within action; I have read the foregoing and know the contents thereof: and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true. This verification is made by me because the above party is a corporation and I am an officer thereof.

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

Sworn to before me on

.....
The name signed must be printed beneath

STATE OF COUNTY OF ss.: (If both boxes are checked—indicate after names, type of service used.)

I, being sworn, say: I am not a party to the action, am over 18 years of age and reside at .

On I served the within

Check Applicable Box

☐ **Service By Mail** by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within this State, addressed to each of the following persons at the last known address set forth after each name:

☐ **Personal Service on Individual** by delivering a true copy thereof personally to each person named below at the address indicated. I knew each person served to be the person mentioned and described in said papers as *a party therein:*

Sworn to before me on

.....
The name signed must be printed beneath

AT the Supreme Court, Westchester County, at the County Courthouse, 111 Dr. Martin Luther King, Jr., Blvd., White Plains, New York, on May __, 2009

P R E S E N T :

HON:

RORY J. BELLANTONI,

A.J.S.C.

----------x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY,
REALIS ASSOCIATES,
THE TOWN OF NORTH CASTLE,
ROBERT BURKE, TERI BURKE,
NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------x

Index No. 9130/06

ORDER GRANTING DISCONTINUANCE
(CPLR 3217(b))

Defendant The Town of North Castle ("Town") having moved this Court, by notice of motion dated April 23, 2009, for an order, pursuant to CPLR 3217(b), permitting Plaintiff to discontinue its claims in this action solely against the Town ("Motion"), and this matter having come on to be heard before the Court on May __, 2009, and the Court having considered the following papers in support of and in opposition to the Motion, all with due proof of service thereof: (1) the notice of motion dated April 23, 2009, and the affirmation of Roland Baroni, Esq., dated April 23, 2009, together with Exhibits 1-3 annexed thereto, in support of the Motion; (2) the affirmation of Leonard Benowich Esq., dated May 5, 2009, together with Exhibits 1-5

annexed thereto, in opposition to the Motion; and the parties, by their respective counsel, having been heard on May __, 2009 in support of and in opposition to the Motion; and the Court, after hearing the arguments of counsel and upon due deliberation and consideration of the foregoing, and after considering Exhibit 2 to the foregoing Affirmation of Roland Baroni, which is a stipulation of discontinuance entered into by and among counsel for plaintiff and counsel for the Town;

NOW, on Motion of BENOWICH LAW, LLP, counsel of record for defendant TNC, it is hereby

ORDERED, that the Town's Motion is granted on the following terms and conditions:

1. the Court's Preliminary Injunction shall remain in full force and effect;

2. no person may or shall open or remove the Gate (as defined or described in the Amended Complaint), except by order of this Court;

3. the Town shall remain subject to discovery by the non-settling Defendants, and shall be required to provide discovery to the non-settling Defendants as if it were still a party to this action, and any and all demands for information by the non-settling Defendants shall be served on the Town's counsel;

4. the Town and/or its counsel shall (a) inform the non-settling Defendants of each and every request for information received from Plaintiff, (b) provide the non-settling Defendants with a copy of any and all documents, materials or statements which are provided or made available to Plaintiff or its counsel, and (c) provide the non-settling Defendants with the name of each Town officer, employee or other person consulted or made available to Plaintiff in connection with any request for information by Plaintiff; and

5. Plaintiff shall be precluded from using on any motion, or offering or introducing at trial, any evidence obtained directly or indirectly from the Town which has not been provided to the non-settling Defendants in accordance with these conditions;

and it is further

ORDERED, that the claims of the Plaintiff as against the Town be, and the same hereby are, discontinued with prejudice, on the foregoing terms and conditions.

ENTER:

_____

Rory J. Bellantoni, A.J.S.C.

S:\Main Files\TNC\SEVEN SPRINGS\Litigation\Discontinuance\order.wpd

Certificate of Service (by U.S. Mail)

LEONARD BENOWICH, an attorney duly admitted to practice in this Court, hereby affirms, under the penalty of perjury, that on May 5, 2009, I served a true copy of the foregoing **Affirmation In Opposition To The Town Of North Castle's Motion For Discontinuance** upon the following counsel:

DelBello Donnellan Weingarten, Wise & Wiederkehr, LLP
One North Lexington Avenue
White Plains, New York 10601
Attorneys for Plaintiff

Stephens Baroni Reilly & Lewis, LLP
75 Main Street
White Plains, New York 10601
Attorneys for Defendant Town of North Castle

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
120 Bloomingdale Road
White Plains, New York 10605
Attorneys for Defendants Burke and Donohoe

by depositing a true copy thereof enclosed in a post-paid wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, addressed to the party and/or parties listed above.

Dated: May 5, 2009

Leonard Benowich

May 5, 2009

LSB

Benowich Law, LLP
1025 Westchester Avenue
White Plains, NY 10604
T (914) 946-2400
F (914) 946-9474
benowichlaw.com

Benowich

Motion Support
9th Floor
Westchester County Supreme Court
111 Martin Luther King Jr. Boulevard
White Plains, New York 10601

Re: Seven Springs v. The Nature Conservancy, et al.
Index No.: 9130/06

Dear Sir:

This firm is counsel to defendant The Nature Conservancy. Enclosed please find our affirmation in opposition to the motion by defendant town of North Castle's.

Also enclosed to be dated-stamped is a front page copy of the affirmation as well as a self-addressed, postage prepaid envelop provided for your convenience.

If you have any questions, please call us.

Very truly yours,

Leonard Benowich

LB/gpb
Enc.

FYI

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

Index No. 9130-06

-against-

REPLY AFFIDAVIT

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

(Bellantoni, J.)

Defendants.

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

BRADLEY D. WANK, being duly sworn, deposes and says:

Your deponent is a partner in the law firm of DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP, attorneys for Seven Springs, LLC ("Plaintiff") and is fully familiar with the facts and circumstances set forth herein.

This Affidavit is submitted in further support of The Town of North Castle's ("North Castle") motion to discontinue this action against North Castle, and in response to the Affirmation of Leonard Benowich, Esq. dated May 5, 2009 (the "Benowich Aff."), which was submitted on behalf of The Nature Conservancy ("TNC") in opposition to North Castle's motion.

TNC's opposition to the instant motion is an obvious and desperate attempt to exact something/anything from a situation that it is unhappy about, namely the settlement between Plaintiff and North Castle.

A plaintiff should be permitted to discontinue an action at any time unless substantial rights of a defendant will be prejudiced. See County of Westchester v.

Welton Becket Associates, 102 A.D.2d 34, 478 N.Y.S.2d 305 (2d Dept. 1984). In County of Westchester, the Appellate Division determined that the lower court erred when it refused to allow the County and design professionals to discontinue the actions among themselves.

The Appellate Division Decision in County of Westchester states the following with respect to the settlement and discontinuance between the parties:

> "The fact that the county and design professionals sought to have the court retain jurisdiction as to any disputes arising under the terms of the settlement agreements simply has no relevance to the requested discontinuances. The fact that certain design professionals may have to be subpoenaed as witnesses now that they are no longer parties to the lawsuit also provides an inadequate reason for preventing them from enjoying the peace they believed they purchased when they settled their claims with the county (*Mielcarek v. Knights*, 50 A.D.2d 122, 375 N.Y.S.2d 922). Forcing the settling parties to continue with their actions as parties to the lawsuit would also entail the danger of presenting the triers of fact with a false image of what the real interests of the parties are with regard to the outcome of the litigation (*Meleo v. Rochester Gas and Elec. Corp.*, 72 A.D.2d 83, 423 N.Y.S.2d 343, mot. For lv. to app. dismd. 49 N.Y.2d 797, 426 N.Y.S.2d 734, 403 N.E.2d 457).

102 A.D.2d 49, 478 N.Y.S.2d 316.

The foregoing is analogous to the instant action. TNC is not prejudiced by the settlement between Plaintiff and North Castle and there is simply no valid basis to deny the relief requested by North Castle, or to impose any terms or conditions on the discontinuance. *See* Great Western Bank v. Terio, 200 A.D.2d 608, 606 N.Y.S.2d 903 (2d Dept. 1994) ("In the absence of special circumstances, such as particular prejudice to the defendant or other improper consequences, an application for a voluntary discontinuance should be granted."); *See also,* County of Westchester, *supra,* 102 A.D.2d at 49, 478

N.Y.S.2d at 315-16 (discontinuance should be permitted in the absence of prejudice to the substantial rights of other parties or an injustice).

The kind of prejudice and/or injustice warranting denial of a motion to discontinue include the kinds situations where discontinuance is used: (i) as a subterfuge to avoid an obligation or obligations imposed by Court Order, *see* Venture I, Inc. v. Voutsinas, 8 A.D.3d 475, 778 N.Y.S.2d 311, 312 (2d Dept. 2004); (ii) as a means to perpetrate a fraud or other wrongdoing upon the rights of a plaintiff's attorney , *see,* Frear v. Lewis, 201 A.D. 660, 667, 195 N.Y.S. 3, 7-8 (2d Dept. 1922); or, (iii) to impugn another party's right to seek affirmative relief by counterclaim or otherwise, *see,* St. James Plaza v. Notey, 166 A.D.2d 439, 560 N.Y.S.2d 670 (2d Dept. 1990). Such prejudice and/or injustice are simply not presented in this case, and denial of the motion would be improper.

Furthermore, while CPLR 3217(b) provides that the "action shall not be discontinued by a party asserting a claim except upon order of the Court and upon terms and conditions, as the court deems proper," the power to impose conditions is not without limits. See *i.e.,* Rosenberg v. 3130 Grand Concourse, Inc., 23 A.D.2d 555, 256 N.Y.S.2d 632 (1st Dept. 1965) (holding that "[t]he power to impose reasonable terms as a condition for allowing a discontinuance did not include power summarily to direct a dismissal of the action on account of failure to comply with the terms imposed.") Lundin v. Mittelman, 281 A.D. 894, 119 N.Y.S.2d 647, 648 (2d Dept. 1953) (the imposing of the condition, that no new action be brought, was inappropriate). As such, it is clear that the terms and conditions imposed, if any, must have some relevance to alleviating the alleged prejudice sustained by a non-settling party.

TNC's proposed Order is nothing more than a "wish list" of items that are either unnecessary, improper or inappropriate.

The Benowich Aff. does not set forth any particular reasons or basis to support its claim that conditions should be imposed on the discontinuance, other than that North Castle may favor Plaintiff over the co-defendants. That is North Castle's prerogative and not a valid basis to impose conditions on the discontinuance or provide TNC with greater rights than it would otherwise be entitled to.

Further, that TNC may be in a less favorable position, from a litigation standpoint, because of a settlement between Plaintiff and North Castle, and discontinuance of this action against North Castle, does not entitle TNC to have conditions imposed on the discontinuance that would provide TNC with greater rights than it would otherwise be entitled to.

It is respectfully submitted that it would not be proper or appropriate to impose any terms or conditions on the discontinuance in the instant case. Moreover, the terms and conditions set forth in the Benowich Aff. and TNC's proposed Order clearly exemplify TNC's attempt to obtain relief that it would not otherwise be entitled to.

For example, the discontinuance of this action against North Castle does not affect the Order granting Preliminary Injunction issued by this Court on April 14, 2008. (A copy of the order Granting Preliminary Injunction is annexed hereto as **Exhibit "A"**.) Accordingly, there is no reason to refer to the Injunction in connection with this motion. Second, the "Gate" is not mentioned in the April 14, 2008 Order. Accordingly, any relief that TNC may seek with respect to the Gate is not before this Court on the instant motion.

Finally, the proposed "conditions" regarding discovery are clearly improper and are a red herring.

The Fifth Paragraph of TNC's proposed Order, which seeks to preclude Plaintiff "from using on any motion, or offering or introducing at trial, any evidence obtained directly or indirectly from the Town which has not been provided to the non-settling Defendants in accordance with these conditions" is perhaps the best example of TNC's overreaching. This "condition" is not relevant to the discontinuance of this action, there is no valid basis to impose such a condition upon the Plaintiff, and, in any event, it is not clear how evidence would be "indirectly" obtained.

If The Nature Conservancy has an objection to discovery, or evidence introduced at trial, those objections can and should be addressed at the appropriate time and through the appropriate methods, not in this motion at this stage of this case.

WHEREFORE, it is respectfully requested that the Town of North Castle's motion be granted in its entirety, together with such other and further relief as the Court may deem just and appropriate.

Bradley D. Wank
BRADLEY D. WANK

Sworn to before me this
12th day of May, 2009
Laura McMahon
Notary Public

LAURA E. McMAHON
Notary Public, State of New York
No. 01MC6017348
Qualified in Orange County
Commission Expires December 14, 2010

AT the Supreme Court, Westchester County, at the County Courthouse, 111 Dr. Martin Luther King, Jr., Blvd., White Plains, New York, on April 14, 2008

PRESENT:

HON:

RORY J. BELLANTONI,

Acting Justice.

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY,
REALIS ASSOCIATES,
THE TOWN OF NORTH CASTLE,
ROBERT BURKE, TERI BURKE,
NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

Index No. 9130/06

ORDER GRANTING PRELIMINARY INJUNCTION

Defendant The Nature Conservancy ("TNC") having moved this Court, by order to show cause dated March 18, 2008, for a temporary restraining order and preliminary injunction ("Motion"), and this matter having come on to be heard before the Court on March 18, 2008 and on April 4, 2008, and the Court having considered the following papers in support of and in opposition to the Motion, all with due proof of service thereof: (1) the Order to Show Cause dated March 18, 2008, supported by the Affirmation of Leonard Benowich, Esq., dated March 13, 2008, the Affidavit of Amy Fenno, sworn to March 11, 2008, and the Affidavit of Jamie Norris, sworn to March 13, 2008, together with Exhibits 1-18 annexed thereto, and a

memorandum of law dated March 13, 2008, in support of the Motion; (2) the affidavit of Alfred Donnellan, Esq., sworn to March 17, 2008, and Exhibits A-E annexed thereto (on behalf of Plaintiff Seven Springs, LLC), and a memorandum of law dated March 17, 2008, in opposition to the Motion; (3) the Affidavit of Alfred Donnellan, Esq., sworn to March 26, 2008, and Exhibits A-G thereto (on behalf of Plaintiff Seven Springs, LLC) and a memorandum of law dated March 26, 2008, in opposition to the Motion; (4) the Reply Affirmation of Leonard Benowich, dated April 2, 2008, and Exhibits 19-22 annexed thereto, and a reply memorandum of law dated April 2, 2008, in support of the Motion; (5) the affirmation of John B. Kirkpatrick, Esq., sworn to April 2, 2008 (on behalf of defendants Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe), in support of the Motion; and (6) the affirmation of Gerald D. Reilly, Esq., dated April 2, 2008 (on behalf of defendant The Town of North Castle), in support of the Motion; and the parties, by their respective counsel, having been heard on March 18, 2008 in support of and in opposition to TNC's application for a temporary restraining order; and the Court having issued a temporary restraining order on March 18, 2008, and having directed that the parties appear on April 4, 2008 for oral argument of that portion of the Motion which sought a preliminary injunction; and the parties, by their respective counsel, having appeared before this Court for oral argument with respect thereto; and the Court, after hearing the arguments of counsel and upon due deliberation and consideration of the foregoing, having rendered its decision on the record of the proceedings held on April 4, 2008;

NOW, on Motion of BENOWICH LAW, LLP, counsel of record for defendant TNC, it is hereby

ORDERED, that TNC's Motion for a preliminary injunction is granted; and it is further

ORDERED, that during the pendency of this action, Plaintiff, its agents, employees and contractors, and all persons having knowledge of this Order or acting in concert with any of the foregoing, be and they hereby are preliminarily enjoined from:

(a) entering upon the lands owned and/or maintained by TNC as the Eugene and Agnes B. Nature Preserve ("Nature Preserve") (i) with any vehicle, equipment or machinery; and (ii) for any purpose other than to walk or hike upon same (*provided, however*, that surveyors employed or retained by Plaintiff may walk upon and conduct land surveys from and of the aforementioned premises, provided that any equipment they bring with them must be carried by-hand by one person); and

(b) performing any work upon any land owned by TNC, including that portion of Oregon Road which ~~is~~ lies or is contained within the Nature Preserve and which is the subject matter of this action (such work includes, by way of illustration and not limitation, cutting or removing any vegetation, shrubbery, bushes or trees; roadway grading; excavation; paving or preparing a roadway for paving; rock and/or debris removal); and it is further

ORDERED, that within ten (10) days of service of a copy of this order with notice of entry, TNC shall give and file an undertaking in the amount of One Hundred Thousand Dollars ($100,000).

ENTER:

Rory J. Bellantoni, A.J.S.C.

C:\Main Files\TNC\SEVEN SPRINGS\Litigation\TRO\PI ORDER.wpd

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)ss:
COUNTY OF WESTCHESTER)

CHRISTINE WILLIAMS, being sworn says:

I am not a party to the action, am over 18 years of age and reside at White Plains, New York (office).

On May 12, 2009, I served a true copy of the annexed **Reply Affidavit** in the following manner:

by transmitting the same to the attorney by electronic means to the telephone number or other station or other limitation designated by the attorney for that purpose. In doing so I received a signal from the equipment of the attorney indicating that the transmission was received; and

by depositing the same with an overnight delivery service in a wrapper properly addressed. Said delivery was made prior to the latest time designated by the overnight delivery service for overnight delivery. The address and delivery service are indicated below

TO:

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
120 Bloomingdale Road
White Plains, New York 10605
Facsimile No.: (914) 422-3636
Federal Express Tracking No.: 7975 8507 7863

Benowich Law, LLP
1025 Westchester Avenue
White Plains, New York 10604
Facsimile No.: (914) 946-9474
Federal Express Tracking No.: 7965 9747 7471

Stephens Baroni Reilly & Lewis
175 Main Street, Suite 800
White Plains, New York 10601
Facsimile No.: (914) 761-0995
Federal Express Tracking No.: 7965 9747 8960

Christine Williams
CHRISTINE WILLIAMS

Sworn to before me this
12th day of May, 2009.

Bradley D. Wank
Notary Public, State of New York
No. 60-4829597
Qualified in Westchester County
Commission Expires December 31, 2009

RJB

DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP

THOMAS R. BEIRNE
BRIAN T. BELOWICH°
RICHARD BEMPORAD
ANN FARRISSEY CARLSON°
DARIUS P. CHAFIZADEH
ALFRED B. DELBELLO
ALFRED E. DONNELLAN†
JANET J. GIRIS▼
FRANK J. HAUPEL
PAUL I. MARX†
FAITH G. MILLER
KEVIN J. PLUNKETT■
PATRICK M. REILLY
JAMES J. SULLIVAN
BRADLEY D. WANK*
MARK P. WEINGARTEN°
LEE S. WIEDERKEHR
PETER J. WISE, AICP †

JACOB E. AMIR
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MATTHEW A. BAVOSO▲
MATTHEW S. CLIFFORD†
JENNIFER M. JACKMAN°
JENNIFER A. LOFARO°
SUSAN CURRIE MOREHOUSE
BIANCA L. RESMINI°
MICHAEL J. SCHWARZ°
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COUNSEL

°MEMBER OF NY & CT BARS
†MEMBER OF NY & NJ BARS
*MEMBER OF NY & DC BARS
▲MEMBER OF NY, CT & NJ BARS
▼MEMBER OF NY, NJ & MA BARS
■MEMBER OF NY & FL BARS
★MEMBER OF NY, NJ, CT & FL BARS

May 12, 2009

RECEIVED

MAY 12 2009

CHIEF CLERK
WESTCHEST[illegible]PREME
AND COUN[illegible]RTS

Via Hand Delivery
Hon. Rory J. Bellantoni
Justice of the Supreme Court
Westchester County Courthouse
111 Dr. Martin Luther King Jr. Blvd.
White Plains, New York 10601

Re: ***Seven Springs LLC v. The Nature Conservancy, et al.***
Supreme Court Westchester County Index No. 9130/06
Return Date of Motion: May 13, 2009

Dear Judge Bellantoni:

We represent Plaintiff in the above referenced matter. Relative thereto, please find enclosed Reply Affidavit.

Very truly yours,

Bradley D. Wank

BDW/cw
Enclosure

1280017
0143500-001

9130 - - 06

Index No. *Year 20*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

REPLY AFFIDAVIT

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
COUNSELLORS AT LAW

Attorneys for **Plaintiff**

ONE NORTH LEXINGTON AVENUE
WHITE PLAINS, NEW YORK 10601

(914) 681-0200

Pursuant to 22 NYCRR 130-1.1-a, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, (1) the contentions contained in the annexed document are not frivolous and that (2) if the annexed document is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom and that (ii) if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYCRR 1200.41-a.

Dated:..... Signature .....

Print Signer's Name.....

Service of a copy of the within *is hereby admitted.*

Dated:

.....
Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within-named Court on* *20*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon.* *, one of the judges of the within-named Court, at on* *20* *, at* *M.*

Dated:

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
COUNSELLORS AT LAW

Attorneys for

To:

ONE NORTH LEXINGTON AVENUE
WHITE PLAINS, NEW YORK 10601

Attorney(s) for

ORIGINAL

STATE OF NEW YORK, COUNTY OF ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York, and

Check Applicable Box

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following.

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.
Dated: .....

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:
being sworn says: I am

Check Applicable Box

☐ Individual Verification — in the action herein; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 20 .....

(Print signer's name below signature)

.....

STATE OF NEW YORK, COUNTY OF ss:
being sworn says: I am not a party to the action, am over 18 years of age and reside at
On , 20 , I served a true copy of the annexed
in the following manner:

Check Applicable Box

☐ Service by Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service, addressed to the address of the addressee(s) indicated below, which has been designated for service by the addressee(s) or, if no such address has been designated, is the last-known address of the addressee(s):

☐ Personal Service — by delivering the same personally to the persons at the address indicated below:

☐ Service by Facsimile — by transmitting the same to the attorney by facsimile transmission to the facsimile telephone number designated by the attorney for that purpose. In doing so, I received a signal from the equipment of the attorney served indicating that the transmission was received, and mailed a copy of same to that attorney, in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service, addressed to the address of the addressee(s) as indicated below, which has been designated for service by the addressee(s) or, if no such address has been designated, is the last-known address of the addressee(s):

☐ Service by Electronic Means — by transmitting the same to the attorney by electronic means upon the party's written consent. In doing so, I indicated in the subject matter heading that the matter being transmitted electronically is related to a court proceeding:

☐ Overnight Delivery Service — by depositing the same with an overnight delivery service in a wrapper properly addressed, the address having been designated by the addressee(s) for that purpose or, if none is designated, to the last-known address of addressee(s). Said delivery was made prior to the latest time designated by the overnight delivery service for overnight delivery. The address and delivery service are indicated below:

Sworn to before me on , 20

.....

.....

(Print signer's name below signature)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

- against -

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

AFFIRMATION IN REPLY AND IN FURTHER SUPPORT OF DISCONTINUANCE

Index No.: 9130/06

Hon. Rory J. Bellantoni

Roland A. Baroni, Jr., Esq., an attorney duly admitted to practice law in the Courts of the State of New York, herein affirms under the penalties of perjury the following statements to be true, except those statements made upon information and belief, as to which he believes them to be true.

1. I am a partner in the law firm of Stephens, Baroni, Reilly & Lewis, LLP, the attorneys for the Town of North Castle, a Defendant in the above-captioned matter. As such, I am fully familiar with the facts and circumstances herein, having served as Town attorneys since 1982.

2. This Affirmation is submitted in Reply to The Nature Conservancy's Opposition to North Castle's application to the Court for an Order pursuant to CPLR §3217(b) discontinuing this action against the Town of North Castle.

3. First and foremost, it must be stated that contrary to The Nature Conservancy's assertion, the Town of North Castle is not seeking a discontinuance in order to excuse its compliance with discovery or any Court order. It is unfair for counsel to make such an

inflammatory suggestion. The Town of North Castle has repeatedly stated that since it technically "does not have a dog in this fight" the town should not be forced to continue litigation at a substantial cost.

THE NATURE CONSERVANCY FAILS TO DEMONSTRATE THAT DISCONTINUANCE OF THE ACTION AGAINST THE TOWN OF NORTH CASTLE WOULD PREJUDICE THE NON-SETTLING DEFENDANTS.

4. Contrary to Mr. Benowich's statements, the non-settling Defendants will not be prejudiced by the Town settling with the Plaintiff and the reasons set forth by The Nature Conservancy do not support the assertion that they would be. When The Nature Conservancy's opposition is examined closely, it fails to point to any real prejudice.
5. For example, the statement that "the Town has paid dearly to have Plaintiff discontinue its claims in this case" (see Benowich Affirmation at page 3, paragraph 7) is neither accurate nor relevant.
6. Moreover, the Town of North Castle is not "abdicating" its position taken in this litigation. In fact, the Town continues to maintain that it properly closed the road in 1990. By seeking this discontinuance the Town is merely saying it does not have a stake in this litigation and that it will no longer oppose the Plaintiff's claims. By stepping out of this action, the Town is not seeking to stand in anyone's way.
7. Additionally, The Nature Conservancy claims that the non-settling Defendant's are prejudiced because they no longer have the ability to rely on the Town's prior actions. This is not true, however even if it were, The Nature Conservancy fails to show how that prejudices them.

8. Furthermore, nothing in the Town's agreement with the Plaintiff states that the Town's position is that the Plaintiff has the right to do whatever it wants. It expressly states that the Town would not "contest the Plaintiff's position that it has easement rights over Oregon Road." (See Roland A. Baroni's Affirmation in Support of Motion at Exhibit 1, page 4, paragraph III (A)). The Town of North Castle believes that it is in its best interests and in the best interests of the residents of the Town that the action be settled and discontinued and The Nature Conservancy's feelings on this matter are not indicative of prejudice.
9. Finally, the non-settling Defendants will not be prejudiced in terms of discovery when they have non-party subpoenas and the Freedom of Information Law at their disposal. The Defendants are free to avail themselves of these vehicles as appropriate.

THE TOWN OF NORTH CASTLE HAS COMPLIED WITH ITS DISCOVERY OBLIGATIONS UNDER THE CPLR

10. Mr. Benowich wrongly states that the Town of North Castle is "playing favorites." The fact that the Town agreed in the Stipulation of Settlement with the Plaintiff to provide reasonable cooperation to the Plaintiff in connection with the on-going litigation does not mean that the Town plans to thwart the non-settling Defendants.
11. Contrary to The Nature Conservancy's statements, the Town did not "vociferously object" to supplying The Nature Conservancy with Discovery Responses. We merely pointed out that they were late in serving their demands, and that we would have preferred to be excused from compliance.

12. The Nature Conservancy's statement that the Town has "failed and refused to honor its statutory discovery obligations in responding to TNC's discovery demands" is disingenuous, inflammatory and inaccurate.

13. On April 13, 2009, the Town served responses to The Nature Conservancy's Demands and Interrogatories. The fact that the Interrogatories were not signed by an officer / employee of the Town was an error, which was ultimately corrected. Additionally, when The Nature Conservancy pointed to a specific response to an interrogatory that they felt was insufficient, we promptly issued a Supplemental Response and then a Second Supplemental Response. See documents annexed hereto as Exhibit 1.

14. It is interesting to see that The Nature Conservancy feels that our responses were "useless" and "provides further evidence that the Town is not likely to be even-handed with all parties when it comes to providing access to the Town's information" when the responses the Town provided to The Nature Conservancy were almost identical to those we provided to the Plaintiff. Please see copies of the Town's responses to the Plaintiff's Interrogatories annexed hereto at Exhibit 2.

15. The Nature Conservancy states that the "Town should be required to provide discovery and other materials to all parties on an even-handed basis" (see Benowich Affirmation at page 3, paragraph 5) – but as Exhibit 2 demonstrates, the Town has done just that.

16. Moreover, the Town of North Castle's Discovery responses were complete. No additional information is available. The Nature Conservancy is requesting that the Court issue an order that the Town be treated as a party with respect to the non-settling Defendants, which is something that would actually put the other Defendants in a better position than

the Plaintiff. To direct the Town be treated as if they were a party in this litigation would obviate the entire settlement and discontinuance.

THE NATURE CONSERVANCY'S "CONDITIONS" UPON THE DISCONTINUANCE SHOULD BE DENIED.

17. It appears that the Conservancy is making an improper use of CPLR 3217. As a general rule, there is a strong policy favoring the enforcement of settlements. *Denburg v. Parker Chapin Flattau & Klimpl*, 604 N.Y.S.2d 900, 905 (1993); *see Hopper v. Lockey*, 8 A.D.3d 802, 803, 777 N.Y.S.2d 922, 923 (3d Dept. 2004) (absent a showing of fraud, collusion, mistake or accident, public policy favors enforcement of settlement agreements as written).
18. The Nature Conservancy has requested the Court impose several conditions upon the discontinuance and though it is recognized that CPLR 3217(b) allows for the discontinuance of an action upon terms and conditions the Court deems necessary, it is not up to other, non-settling Defendants to establish those terms.
19. With respect to The Nature Conservancy's condition that the Preliminary Injunction remain in full force and effect, it is respectfully submitted that it is not up to the parties to dictate the terms of the Preliminary Injunction. Furthermore, no one has suggested anything that would violate that injunction, and therefore, there is no need for the Court to impose such a condition.
20. In that same vein, it is not up to The Nature Conservancy to dictate whether or not the gate is opened and / or removed. The Preliminary Injunction prevented the *Plaintiff* from

entering onto The Nature Conservancy's property with any vehicle, equipment or machinery and from performing any work upon the portion of Oregon Road that is at issue in this litigation.

21. The Nature Conservancy seems to be asking the Court to enlarge the scope the Preliminary Injunction to prevent the Town from removing the gate that it owns and controls. It is not a subject dealt with in the Stipulation of Settlement nor, we submit, is it a proper subject for the Court's consideration on this motion.

22. The Nature Conservancy provides no authority for its request that the Town continue to be treated as if it were still a party to this litigation. This very request goes against the reason behind the settlement in the first place. The Town should not be forced to participate in costly litigation, the outcome of which will have no impact upon the Town's rights, especially when the Plaintiff itself consents to the discontinuance.

23. As previously stated, The Nature Conservancy and the other non-settling Defendant's have other vehicles available to them to secure documentation and the Town should not be held to the higher standards of a party. When the Town of North Castle first moved for a "so ordered" discontinuance, The Nature Conservancy argued that so-ordering the stipulation, or any other court intervention to approve the settlement, was not appropriate. This is inconsistent with its argument now that the Court should approve the discontinuance only with these terms and conditions.

CONCLUSION

24. The purpose of the CPLR to require a court order for voluntary discontinuance is to curb abuse by plaintiffs seeking to improperly obtain a strategic advantage or a second bite at the apple; it is *not* to limit an honest settlement between a plaintiff and one or more defendants. *Lundin v. Mittelman*,115 N.Y.S.2d 775, 776 (NY Sup. 1952) (discontinuance "has in mind the ending of litigations;" it is not to be used "as a step in a plan for a fresh start to avoid mistakes and the effect of the work of defendants' attorney preparatory to a trial"); *see also Baltia Air Lines, Inc. v. CIBC Oppenheimer Corp.*, 273 A.D.2d 55, 56, 709 N.Y.S.2d 54, 57 (1st Dept. 2000) (discontinuance intended to avoid an adverse decision on the merits properly denied); *Getz v. Harry Silverstein, Inc.*, 205 Misc. 431, 432, 128 N.Y.S.2d 436, 437-38 (N.Y. City Ct.1954) (rule is intended "to prevent a discontinuance for the sole purpose of warding off an adverse decision and enabling a defeated plaintiff to make another try, although he has really had his fair day in court") (citing 19th Annual Report of N. Y., Judicial Council, 1953, pp. 201-217).

25. The cases cited by The Nature Conservancy are not to the contrary. Each involved a *unilateral* attempt to discontinue an action for the specific purpose of circumventing a court order by a plaintiff who had no other reason to make the motion and sought discontinuance *without prejudice*. *See Kaplan v. Village of Ossining*, 827 N.Y.S.2d 278 (2d Dept. 2006) (plaintiff who sought discontinuance "without prejudice" was "*merely* attempting to circumvent the effect of a preceding . . . order . . .") (emphasis added); *Venture I, Inc. v. Voutsinas*, 778 N.Y.S.2d 311 (2d Dept. 2004) (plaintiff "merely

attempting to circumvent the order"); *Casey v. Custom Crushing & Materials, Inc.*, 765 N.Y.S.2d 268 (plaintiff seeking discontinuance "without prejudice"); *Schneider v. Schneider*, 300 N.Y.S.2d 270 (1st Dept. 1969) (husband seeking to discontinue separation action to avoid order for support *pendente lite*, so that wife would have to file a new action to obtain support); *Autz v. Fagan*, 16 Misc.3d 1140(A), 851 N.Y.S.2d 56 (Sup. Ct. Nassau Cty. 2007) (denying conditional withdrawal without prejudice of special proceeding to dissolve and liquidate business).

26. None of the cases TNC cites involves a settlement or a stipulation for discontinuance *with* prejudice and by mutual consent of settling parties on both sides of the aisle, as is the case here. In any event, TNC has nothing to substantiate a claim that Seven Springs or North Castle settled this matter "for the purpose of avoiding" some adverse discovery order, let alone "merely" to circumvent such order. There is no basis for an inference that the North Castle's application to discontinue is motivated by the desire to avoid compliance.

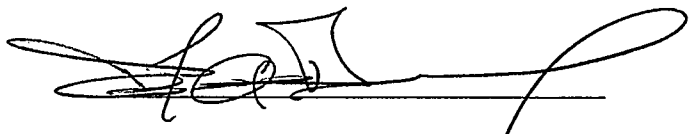
27. The bottom line is, "part[ies] cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted" *Autz v. Fagan* 851 N.Y.S.2d 56, (Sup. Ct. Nassau Co. 2007, citing, *Tucker v. Tucker*, 55 N.Y.2d 378, 383-384, 434 N.E.2d 1050, 449 N.Y.S.2d 683 (1982); and *Great Western Bank v. Terio*, 200 A.D.2d 608, 606 N.Y.S.2d 903 (2nd Dept.), *lv. app. den.*, 83 N.Y.2d 901, 637 N.E.2d 273, 614 N.Y.S.2d 382 (1994)]."

28. In the case at bar, there are no special circumstances that would warrant a denial of the pending Motion for Discontinuance. The non-settling Defendant's have not proven that they would be prejudiced by the Town settling with the Plaintiff.

29. For all the foregoing reasons, your deponent prays that an order be entered discontinuing this action against the Town of North Castle without the terms and conditions supplied by The Nature Conservancy. Accordingly, it is respectfully requested that the Court "So Order" the Stipulation discontinuing the action against the Town of North Castle (annexed to the Town's moving papers as Exhibit 2), or in the alternative, sign the proposed order discontinuing the action against the Town of North Castle annexed to the moving papers as Exhibit 3.

WHEREFORE, it is respectfully requested that the Town's motion be granted in its entirety together with such other and further relief as the Court may deem just and appropriate.

Dated: May 11, 2009
White Plains, New York



By: Roland A. Baroni, Jr.
Stephens, Baroni, Reilly & Lewis, LLP
Attorneys for the Town of North Castle
175 Main Street Suite 800
North Court Building
White Plains, New York 10601
(914) 761-0300

To:

Benowich Law, LLP
ATTN: Mr. Leonard Benowich, Esq.
Attorneys for the Nature Conservancy
1025 Westchester Avenue
White Plains, New York 10604

Oxman, Tulis, Kirkpatrick, Whyatt & Geiger
ATTN: Mr. John Kirkpatrick, Esq.
Attorneys for Mr. & Mrs. Burke
and Mr. & Mrs. Donohoe
120 Bloomingdale Road
White Plains, New York 10601

DelBello, Donnellan, Weingarten, Wise & Wiederkehr, LLP
ATTN: Mr. Bradley D. Wank, Esq.
Attorneys for Plaintiff
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

Exhibit 1

STEPHENS, BARONI, REILLY & LEWIS, LLP
ATTORNEYS AND COUNSELORS AT LAW

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ROLAND A. BARONI, JR.
STEPHEN R. LEWIS

KRISTEN L. HOLT

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FAX (914) 761-0995
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COUNSEL
JAMES R. CARUSO (1906-1994)

NORTHERN WESTCHESTER OFFICE
OLD POST ROAD PROFESSIONAL BUILDING
CROSS RIVER, NEW YORK 10518

SERVICE NOT ACCEPTED
BY FAX OR E-MAIL

April 27, 2009

Benowich Law, LLP
1025 Westchester Avenue
White Plains, New York 10604
ATTN: Mr. Len Benowich, Esq.

RE: *Seven Springs, LLC. v. The Nature Conservancy, et al.*
Index No.: 9130/06

Dear Mr. Benowich:

Pursuant to your letter dated April 16th, enclosed please find North Castle's Supplemental Response to your Interrogatories together with a Verification.

I trust all is self-explanatory.

Very truly yours,

Kristen L. Cinque

KLC/kc
Enclosures
cc: Ms. Lois Rosen *(with enclosures)*
Mr. Bradley Wank, Esq. *(with enclosures)*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

Index No.: 9130/06

- against -

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

DEFENDANT'S (TOWN OF NORTH CASTLE) SUPPLEMENTAL RESPONSE TO THE NATURE CONSERVANCY'S THIRTEENTH INTERROGATORY

13. Identify all persons who supplied any information used to prepare North Castle's responses hereto and for each such person identify the information supplied or attach a copy thereof to your responses to these interrogatories.

Kristen L. Cinque and Roland A. Baroni, Jr. utilized records from the Town Hall, Town of North Castle and the files of Stephens, Baroni, Reilly & Lewis to prepare responses to the Nature Conservancy's Interrogatories.

Dated: April 27, 2009
White Plains, New York

Yours, etc.

STEPHENS, BARONI, REILLY & LEWIS, LLP

By: Kristen L. Cinque, Esq.
Attorneys for Defendant, Town of North Castle
Northcourt Building
175 Main Street, Suite 800
White Plains, NY 10601
(914) 761-0300

To:

Benowich Law, LLP
ATTN: Mr. Len Benowich, Esq.
Attorneys for the Nature Conservancy
1025 Westchester Avenue
White Plains, New York 10604

DelBello, Donnellan, Weingarten, Wise & Wiederkehr, LLP
ATTN: Mr. Bradley Wank, Esq.
Attorneys for Plaintiff
One North Lexington Avenue
White Plains, New York 10601

Oxman, Tulis, Kirkpatrick, Whyatt & Geiger
ATTN: Ms. Lois Rosen, Esq.
Attorneys for Mr. & Mrs. Burke
and Mr. & Mrs. Donohoe
120 Bloomingdale Road
White Plains, New York 10601

STEPHENS, BARONI, REILLY & LEWIS, LLP
ATTORNEYS AND COUNSELORS AT LAW

GERALD D. REILLY
ROLAND A. BARONI, JR.
STEPHEN R. LEWIS

KRISTEN L. HOLT

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COUNSEL
JAMES R. CARUSO (1906-1994)

NORTHERN WESTCHESTER OFFICE
OLD POST ROAD PROFESSIONAL BUILDING
CROSS RIVER, NEW YORK 10518

SERVICE NOT ACCEPTED
BY FAX OR E-MAIL

May 4, 2009

Benowich Law, LLP
1025 Westchester Avenue
White Plains, New York 10604
ATTN: Mr. Len Benowich, Esq.

RE: *Seven Springs, LLC. v. The Nature Conservancy, et al.*
Index No.: 9130/06

Dear Len:

Enclosed, please find the Town of North Castle's Second Supplemental Response to The Nature Conservancy's Thirteenth Interrogatory together with a Verification.

I trust all is self-explanatory.

Very truly yours,

Kristen L. Cinque

KLC/kc
Enclosures
cc: Ms. Lois Rosen *(with enclosure)*
Mr. Bradley Wank, Esq. *(with enclosure)*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

Index No.: 9130/06

- against -

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

DEFENDANT'S (TOWN OF NORTH CASTLE) SECOND SUPPLEMENTAL RESPONSE TO THE NATURE CONSERVANCY'S THIRTEENTH INTERROGATORY

13. Identify all persons who supplied any information used to prepare North Castle's responses hereto and for each such person identify the information supplied or attach a copy thereof to your responses to these interrogatories.

Kristen L. Cinque and Roland A. Baroni, Jr. utilized records from the Town Hall, Town of North Castle and the files of Stephens, Baroni, Reilly & Lewis to prepare responses to the Nature Conservancy's Interrogatories. The Town of North Castle's records were compiled from the Town Clerk's Office with the assistance of the Town Clerk, Ann Leber and her assistant Amelia DeFeo.

Dated: May 4, 2009
White Plains, New York

Yours, etc.

STEPHENS, BARONI, REILLY & LEWIS, LLP

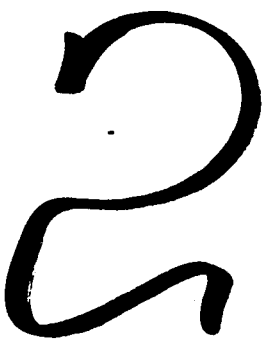
By: ~~Kristen L.~~ Cinque, Esq.
Attorneys for Defendant, Town of North Castle
Northcourt Building
175 Main Street, Suite 800
White Plains, NY 10601
(914) 761-0300

To:

Benowich Law, LLP
ATTN: Mr. Len Benowich, Esq.
Attorneys for the Nature Conservancy
1025 Westchester Avenue
White Plains, New York 10604

DelBello, Donnellan, Weingarten, Wise & Wiederkehr, LLP
ATTN: Mr. Bradley Wank, Esq.
Attorneys for Plaintiff
One North Lexington Avenue
White Plains, New York 10601

Oxman, Tulis, Kirkpatrick, Whyatt & Geiger
ATTN: Ms. Lois Rosen, Esq.
Attorneys for Mr. & Mrs. Burke
and Mr. & Mrs. Donohoe
120 Bloomingdale Road
White Plains, New York 10601



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff, Index No.: 9130/06

- against -

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

DEFENDANT'S (TOWN OF NORTH CASTLE) RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

1. Set forth and identify all facts upon which Defendant intends to rely on at trial, or which support the allegations relating to the Affirmative Defense that "the Complaint fails to state a cause of action."

The Plaintiff's bare legal claim that it possesses an easement over Oregon Road is not supported by any applicable law nor does it have any lawful right to have ingress / egress over the road. Oregon Road had been a public road that ran between the Town of North Castle and the Town of New Castle. It had not been used as a highway since approximately 1980. In May 1990 the Town Board for the Town of North Castle unanimously voted to close Oregon Road, file a Certificate of Discontinuance and order a gate large enough to close the road. On May 10, 1990 a Certificate of Discontinuance was filed with the North Castle Town Clerk's office. The certificate was filed pursuant to §205 of the Highway Law and expressly stated that Oregon Road was no longer being used for public travel, that it was being used to illegally dump undesirable material, that maintaining the road was a waste of public funds and that the affected property owner (Rockefeller University) had consented to the closure. Once the road was closed any and all rights the Plaintiff had, if any, were terminated and there were no grounds to file an action.

2. Set forth and identify all facts upon which Defendant intends to rely on at trial, or which support the allegations relating to the Affirmative Defense that "the Complaint is barred, in whole or in part, by the applicable statutes of limitations."

The decision to close Oregon Road was not challenged for more than sixteen years. Under any of the arguably applicable statutes of limitation, the Plaintiff's Complaint is time barred.

The town's decision to close Oregon Road and its actions in furtherance thereof qualify as an administrative or "quasi-legislative act" and therefore, a four month statute of limitations should be applied, making the Plaintiff's action (filed in 2006 untimely under Article 78 of the CPLR.

Alternatively, §205 of the Highway Law provides for a one-year statute of limitations in any action or proceeding involving the abandonment or qualified abandonment of a highway made pursuant to that section. The Town of North Castle effectively closed Oregon Road for all purposes in May 1990. Once the Certificate of Discontinuance was filed in the Town Clerk's office on May 10, 1990, the one year limitation period was triggered. Therefore any person wishing to challenge the closure of Oregon Road had until May 10, 1991 to do so.

Even if the Town of North Castle improperly closed the road, New York case law provides that as long as the entire width of a highway is blocked, the obstructed section ceases to be a highway. This occurs after six years of nonuse, even if the blocking of the highway may have been a wrongful act. 19. in that situation, the six year limitation period began when the Town resolved to close the road and erect the gate (May 10, 1990) and the road would have been deemed abandoned after May 10, 1996.

New York CPLR §212(a) requires any person seeking to recover real property must commence an action within ten years. The Plaintiff owned the property since 1995 - for approximately eleven years -- and the gate had been erected for approximately five years prior to Plaintiff's ownership. The Plaintiff knew of the gate's existence when it purchased the property, or discovered it soon thereafter. The ten year statute of limitations expired ten years after the Plaintiff erected the gate. Additionally, even if it is determined that the road was not abandoned until May 10, 1996 and the ten year period should run from that date, the action would still be time-barred as the Plaintiff did not commence the action until May 15, 2006.

3. Set forth and identify all facts upon which Defendant intends to rely on at trial, or which support the allegations relating to the Affirmative Defense that "the Complaint is barred, in whole or in part, by the doctrines of waiver, laches and / or estoppel."

The Plaintiff's inexplicable and undue delay in bringing this action against the defendants more than 10 years after its purchase of the property would impose a great burden on all of the Defendants. The road has been closed for almost twenty years, and to reopen it now would require legal action on the part of the Town, and would prejudice the individual homeowners who purchased their homes in reliance on the fact that they lived at the end of a 'dead-end' street. The Plaintiff purchased the property with the knowledge that the road was closed. None of the Defendants knew the Plaintiff would have asserted these claims in light of the fact that several years earlier, the Plaintiff's representatives denounced any claim or right to Oregon Road.

4. Set forth and identify all facts upon which Defendant intends to rely on at trial, or which support the allegations relating to the Affirmative Defense that "the Complaint is barred, in whole or in part, by the applicable Statute of Frauds."

At this time, this Defendant is not prepared to answer this question.

5. Set forth and identify all facts upon which Defendant intends to rely on at trial, or which support the allegations relating to the Affirmative Defense that "the Complaint is barred, in whole or in part, because no easement or right-of-way was intended to be, nor was, conveyed to plaintiff or its predecessors-in-title, by any of the deeds referred to in the Complaint."

Plaintiff's predecessor in interest, Rockefeller University consented to the closing of the road, and with that consent, abandoned the rights that it may have had over the land. One extinguished, an easement cannot be revived except by an express grant. The deed from Rockefeller to Plaintiff does not contain any express grant (or any express reference) to Oregon Road. The Plaintiff could not obtain that which did not belong to its predecessors.

6. Set forth and identify:

a. All facts upon which Defendant intends to rely on at trial, or which support the allegations relating to the Affirmative Defense that the "complaint is barred, in

whole or in part, because any easement or right of way claimed by plaintiff was extinguished, prior to the time plaintiff obtained title thereto, by plaintiff's predecessors-in-title's abandonment, consent to the closing or discontinuance thereof and / or consent or acquiescence to the Town of North Castle's installation of a locked barrier or gate at 'Pole 40'."

*Once the road was closed, any private easements and / or road-widening easements were lost. (*Crossin v. Woolf, *220 N.Y. 586, 115 N.E. 1036 (1917)).*

Additionally, because there is no common grantor, no private easement ever existed. Private easements may not be expressly or impliedly created by grant over purported streets where the ownership of the land in the streets and of all easement rights therein is vested in a third person or in a municipality not a party to a grant. Such an easement arises only when it is shown that ownership of the land and the bed of the street were once the property of a common grantor. Kent v. Dutton, *122 A.D.2d 558, 505 N.Y.S.2d 287, 288 (4th Dept. 1986).*

'Common grantor' and 'common source of title' are not synonymous. Stupnicki v. Southern New York Fish & Game Assoc., *41 Misc. 2d 266, 271, 244 N.Y.S.2d 558, 563 (Columbia County, 1962). It is not enough to show a common source of title. A party must show a common grantor.* Kent v. Dutton, *122 A.D.2d 558, 559, 505 N.Y.S.2d 287, 288 (4th Dept. 1986). The Plaintiff cannot make such a showing.*

Once the easement was abandoned, it cannot be revived by anything short of an express grant. See, Sam Development, LLC v. Dean, *292 A.D.2d 585, 586, 740 N.Y.S.2d 90, 92 (2d Dept. 2002) citing* Stilbell Realty Corp. v. Cullen, *43 A.D.2d 966, 967, 352 N.Y.S.2d 656 (2d Dept. 1794). Rockefeller University, Plaintiff's predecessor, could not convey that which it no longer possessed.*

Furthermore, despite the fact that Rockefeller University itself did not install the gate, it consented to the Town of North Castle doing so. The installation of a barrier coupled with the University's non-use is sufficient for a finding of abandonment of the private easement. See Albanese v. Domianni, *118 N.Y.S.2d 347 (2d Dept. 1953).*

b. The individual or individuals who allegedly consented to the closing or discontinuance, and set forth all facts upon which Defendant bases its allegations as to the specific individual(s) identified.

As evidenced by the Certificate of Discontinuance and the minutes of the North Castle Town Board, Rockefeller University consented to the closure of Oregon Road, thereby extinguishing any easements.

7. Set forth and identify:

a. All facts upon which Defendant intends to rely on at trial, or which support the allegations relating to the Affirmative Defense that "the Complaint is barred, in whole or in part, because any easement or right-of-way claimed by Plaintiff was extinguished by adverse possession."

New York CPLR §212(a) requires any person seeking to recover real property must commence an action within ten years. The Plaintiff owned the property since 1995 (for approximately eleven years) and the gate was erected in May 1990. The Plaintiff knew of the gate's existence when it purchased the property, or discovered it soon thereafter. The ten year statute of limitations expired ten years after the Plaintiff erected the gate. Additionally, even if it is determined that the road was not abandoned until May 10, 1996 and the ten year period should run from that date, the action would still be time-barred as the Plaintiff did not commence the action until May 15, 2006.

The erection of the gate across Oregon Road constitutes adverse possession as a matter of law.

b. All facts upon which Defendant intends to rely on at trial or establish or tend to establish that any of the Defendants use of Oregon Road was:

(1) hostile and under a claim of right

RAPL §501(3) defines 'claim of right' as a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be. The Town of North Castle erected the gate across Oregon Road pursuant to an official Resolution of the Town Board based upon their position that the

road was a Town road, and that there were no private rights to the road. "By definition, a claim of right is adverse to the title owner and also in opposition to the rights of the true owner." Walling v. Przybylo, *2006 NY Slip Op 4747, 5 (N.Y. 2006)*

The Plaintiff purchased the property in 1995 and it knew or should have known that the portion of Oregon Road in the Town of North Castle was closed for all purposes and had been since in or about 1990. The Plaintiff was chargeable with the knowledge that the road was closed. The Town of North Castle's continued maintenance of the locked gate and surrounding property was hostile to the Plaintiff since Plaintiff purchased the of land in 1995, and it was not until ten years later they sought to assert their rights. Having used the property openly and continuously for more than 10 years, North Castle is entitled to the presumption that such use was hostile.

(2) actual

The erection and maintenance of the located gate constitutes actual use of the land.

(3) open and notorious

The Plaintiff purchased the property in 1995 and it knew or should have known that the portion of Oregon Road in the Town of North Castle was closed for all purposes and had been since in or about 1990. The Plaintiff was chargeable with the knowledge that the road was closed.

(4) exclusive

Following construction of the gate, the area was continuously and exclusively used by North Castle for more than 16 years; the gate was kept locked except when North Castle authorized access.

In its Memorandum of Law, Plaintiff admitted that the gate is sufficient to make Oregon Road "impassable to or from Oregon Road to the south by persons in vehicles."

Furthermore, Plaintiff's representatives acknowledged as early as 1998 that "Vehicular access to the dirt road (Old Oregon Road) which continues north is blocked by a steel barricade. Exhibit B. (Emphasis added).

Additionally, in a November 15, 2000 memo to the Co-Lead Agency Saccardi & Schiff wrote that the area "is currently a walking trail, and has been blocked by vehicular use...it is also possible that substantial improvements may need to be made to the existing abandoned travel-way of Old Oregon Road in North Castle and New Castle since that travel-way is unlikely to be passable by emergency service vehicles in its present condition."

The gate, which effectively blocks the entire roadway, need only block a portion of the length of the highway as long as the gate spans the entire width, making normal passage impossible.

(5) continuous for a period of 10 years

The locked gate was erected in 1990 and to date, continues to block access to Oregon Road.

c. All facts upon which Defendant intends to rely on at trial or establish or tend to establish the requirement of cultivation or use of Oregon Road [as required by RPAPL §522(1)] or enclosure [as required by RPAPL §522(2) by any of the Defendants.

See response to #7, above. In addition, although the cultivation / use requirement has been removed from RPAPL §522(1), the Town maintained the gate and cleaned the surrounding property on a regular basis. Additionally see Mourelatos v. Fraternal Society of Canicatti, Inc. *6 Misc. 3d 183, 185 (Sup. Ct. Queens, 2004) [a chain link fence is a 'substantial enclosure' as a matter of law and is a total obstruction of the easement. Dominant estate owner admitted being aware of the fence from the time he purchased the property and that the fence entirely blocked the subject easement at that time.]*

8. Set forth and identify all facts upon which Defendant intends to rely on at trial, or which support the allegations relating to the Affirmative Defense that "the Complaint is barred, in whole or in part, because any easement or right-of-way claimed by Plaintiff was extinguished, prior to the time Plaintiff obtained title thereto, by the merger of the dominant and servient estates into the ownership of Meyer."

Meyer owned all of the land along the east side of Oregon Road, title to the entire bed of Oregon Road, and all of the land along the west side of Oregon Road. During the time of Meyer's ownership, no one other than Meyer had any interest in or to any of the dominant or servient interests affecting that land. Any easement that may have existed was extinguished when the lands owned by Plaintiff and the Nature Conservancy were owned by Meyer because the title in fee to both the dominant and servient tenements were vested in one person.

9. Set forth and identify all facts upon which Defendant intends to rely on at trial, or which support the allegations relating to the Affirmative Defense that "the Complaint is barred, in whole or in part, because Plaintiff knew or should have known, at the time it acquired the . . . Seven Springs parcel that Oregon Road was closed, that no public road, street or way existed at that place and time and that no private easement was being conveyed."

The Town of North Castle properly closed Oregon Road in or about 1990, and simultaneously filed a Certificate of Discontinuance with the Town Clerk of the Town of North Castle. Moreover, the road was closed by operation of law despite Plaintiff's argument that the Certificate was not in its chain of title; there is no such requirement.

Seven Springs, LLC has been the owner of the property since 1995 - for approximately eleven years - and all the while it has been attempting to develop the parcel in one form or another. Dating back to 1996, the Plaintiff proposed construction of a championship golf course together with some ancillary structures. Constructive knowledge can be imputed to the Plaintiff by virtue of the fact that there is a very large gate that spans the mouth of Oregon Road. It is clearly visible and blocks access to Oregon Road from North Castle.

The Plaintiff had actual knowledge of the road closure in the Town of North Castle dating back to at least 1998. This is evidenced by numerous documents submitted by the Plaintiff's representatives (Saccardi & Schiff, retained by the Plaintiff as planning and development consultants) as well as documentation exchanged by the Co-Lead

Agency and the Towns' Planning Consultants. These documents have been previously submitted to the Plaintiff.

The Plaintiff cannot claim that it had no reason to assert its interest to and through Oregon Road until October 2004 when the issue of secondary access was raised by the Planning Boards, because this issue was raised as early as the year 2000. It is the Town of North Castle's opinion that one topic repeatedly discussed by the Bedford Boards was vehicular access and emergency access. It was clear that the Town of Bedford objected to having the only access to the Plaintiff's property be through its town. In fact, the Bedford Board suggested that the Nature Conservancy be required to deed the bed of Oregon Road (south) in North Castle to the Plaintiff so that it could control the re-opening of this part of the road. By virtue of this discussion at the meeting, it seems apparent that the Town of Bedford was concerned with a secondary access point as early as the beginning of 2000.

Furthermore, in the Co-Lead Agency's findings (previously submitted to Plaintiff) it was noted that Old Oregon Road had been abandoned as a town road in both the Town of North Castle and the Town of New Castle.

The Plaintiff was well aware of the Town of Bedford's desire to have access through North Castle. It cannot deny such knowledge now. Since shortly after the time of Plaintiff's purchase of the property in question, it actually knew (or at the very least should have known) that the portion of Oregon Road in the Town of North Castle was closed for all purposes and had been for years prior to its purchase, they are bound by that today.

As the Plaintiff actually knew that the road had been "officially closed" and "demapped" by the Town of North Castle and because it is chargeable with the knowledge that the road had been closed, as evidenced by a large gate had been erected effectively blocking off Oregon Road, it cannot credibly argue that it did not know the road had been closed.

10. Set forth and identify all facts upon which Defendant intends to rely on at trial, or which support the allegations relating to the Affirmative Defense that "the Complaint is barred, in whole or in part, because the parcels of land that comprise the Seven Springs parcel include one or more parcels of land that did not belong to, and were not acquired from, Meyer but which were acquired by Plaintiff or its predecessor in title after any claimed easement was extinguished. No easement may be implied where, as here, its use will benefit after-acquired parcels."

In or about June 2006, the Plaintiff acquired property from Realis Associates near the land at issue in the litigation. Easements, if any, cannot benefit after-acquired parcels.

11. Set forth and identify all facts upon which Defendant intends to rely on at trial, or which support the allegations relating to the Affirmative Defense that "the Complaint is barred, in whole or in part, because the parcels of land that comprise the Seven Springs parcel have frontage on and access to a public highway to the northern portion of the Seven Springs parcel."

Oregon Road runs between the Town of North Castle and the Town of New Castle. The Plaintiff wishes to utilize a portion of the road located in the Town of North Castle in order to have a second *access point through the Nature Conservancy's property to its proposed multi-million dollar development. At the time the action was commenced, the North Castle parcel was not landlocked and any arguments Plaintiff made implying that it required an easement by necessity were inaccurate. Any actions that the Plaintiff took subsequent to this action that may have landlocked its North Castle parcel should not serve to create an easement.*

12. Set forth and identify:

a. All facts upon which Defendant intends to rely on at trial, or which support the allegations relating to the Affirmative Defense that "the Complaint is barred, in whole or in part, because the Plaintiff has admitted orally and in writing, prior to the commencement of the litigation that it had no rights or interests including the right to use as ingress and egress, that portion of Oregon Road owned and controlled by the Defendants."

DEIS February 1998
"[T]his road would require approval from the Nature Conservancy, which fully owns the entire road bed south of Seven Springs, and from the Town of North Castle, which officially closed the road in 1990. At the present time, the owners of the Seven Springs site have no rights to utilize any part of this portion of the roadway."

DEIS June 1998; similar language.

December 13, 2000 Public Meeting of the Co-Lead Agency
"Old Oregon Road has been de-mapped by the Town of North Castle and the Town of New Castle, so if that option is pursued . . .it would require several actions by both towns."

December 14, 2000 Public Meeting of the Co-Lead Agency
"[Old Oregon Road] is demapped by the Town of North Castle . . .We don't own that road, we own a piece of it. It is owned by the Nature Conservancy."

Responses to FEIS Hearing Comments February 27, 2001
"this road connection . . . would require approval from The Nature Conservancy, which fully owns the entire road bed south of Seven Springs . . .the Town of North Castle . . . officially closed the road in 1990. At the present time, the owners of the Seven Springs site have no rights to use any part of the portion of the roadway located south of the site."

April 25, 2002 Minutes of the Co-Lead Agency
"The roadbed of Old Oregon road has been abandoned as a town road in both the Towns of North Castle and New Castle. The nature Conservancy now owns portions of it between Byram Lake Road in North Castle and Sarles Street in New Castle.

November 15, 2000 Memo from Plaintiff's then-representative, Saccardi & Schiff
"It is noted that the right-of-way of Old Oregon Road in New Castle was previously abandoned as a mapped street on the Town's Official Map.

b. The individual or individuals who allegedly admitted, orally or in writing, that Plaintiff had "no rights or interests, including the right to use as ingress and egress, that portion of Oregon Road owned and controlled by the Defendants."

   i. If the alleged admission was oral, state the sum and substance thereof.
   See excerpts from public hearings from Plaintiff / Plaintiff's representatives relating to Plaintiff's lack of rights to Oregon Road previously submitted in response to Plaintiff's Document Demand at Exhibit 6.

   ii. If the alleged admission was in writing, attach a true copy of same.
   See excerpts from Plaintiff's DEIS relating to Plaintiff's lack of rights to Oregon Road previously submitted in response to Plaintiff's Document Demand at Exhibit 6.

13. Set forth and identify all facts upon which Defendant intends to rely on at trial, or which support the allegations relating to the Affirmative Defense that "the Complaint is barred, in whole or in part, because the Plaintiff does not own, and never acquired title to any portion of the bed of Oregon Road lying to the westerly side of the Seven Springs parcel."

14. State the date when Oregon Road was first used as a public street, road or highway.

At this time, the Defendant is unsure of the exact date Oregon Road was first used as a public street, road or highway. However, the Defendant knows that it was used as such by the public since at least 1970.

15. State in detail all facts known to or believed by each Defendant with respect to whether Oregon Road had been used as a public street, road or highway prior to the time when Eugene Meyer first acquired any parcel of land which is included in either (a) the Seven Springs parcel or (b) the Nature Conservancy Property.

See response to #14, above.

16. State the date when Oregon Road ceased being used as a public street, road or highway.

The Defendant is unsure of the exact date Oregon Road ceased being used as a public street, road or highway, but upon information in belief it was in or about 1980.

17. Did any of the Defendants, their agents or employees ever place any gate or barrier on or across Oregon Road?

Yes.

18. If the answer to Interrogatory No. 17 is anything but an unqualified "no:"

a. Identify the type of gate or barrier;

The gate is a locked metal barrier that spans the width of the entrance to Oregon Road. See photos previously submitted in response to the Plaintiff's Document Demand at Exhibit 2.

b. State the date(s) when, and place(s) where the gate or barrier was placed on, or across, Oregon Road;

The gate was erected in or about May 1990.

c. Identify who placed the barrier or gate on or across Oregon Road;

Employees of the Town of North Castle. The exact identities of the individual(s) is not known at this time, but were employed with the Highway Department.

d. Set forth and identify all actions taken with respect to the maintenance of the gate or barrier;

The Town of North Castle has replaced / repaired the gate, the chain and the lock on at least four occasions in the past when the gate has been damaged / vandalized. The Town of North Castle has also cleaned the area surrounding the gate.

e. Was the gate or barrier locked? If so, (i) when was the lock placed on the gate or barrier? (ii) who placed the lock on the gate or barrier? (iii) if the lock required a key, set forth and identify all persons who had access to the key and where the key was located.

The gate is kept locked on a regular basis. The Town of North Castle placed the lock on the gate. At this time, the Defendant is only aware that the Town of North Castle Highway Superintendent possesses a key to the lock.

19. Were there any oral discussions or communications between any of the Defendants, their attorneys, agents or employees, and Rockefeller University, or its predecessors in interest, or their agents, employees or attorneys concerning or relating to Oregon Road? If so, identify the individuals involved, the date the communications or discussions took place, identify all individuals that were present and set forth the sum and substance of the discussions or communications. If such communication was in writing, attach a copy to your response to this Interrogatory.

Throughout the entire road-closure process, the Town of North Castle was engaged in discussions with The Nature Conservancy and Rockefeller University

(the Plaintiff's predecessor), which culminated with Rockefeller's consenting to the closure, the filing of the Certificate and the erection of the gate. The Town of North Castle communicated mainly with Rockefeller University's attorney, Millbank, Tweed, Hadley & McCloy

20. Were there any oral discussions or communications between Eugene and Agnes E. Meyer Foundation, its attorneys, agents or employees, and Yale University, or its predecessors in interest, or their agents, employees or attorneys concerning or relating to Oregon Road? If so, identify the individuals involved, the date the communications or discussions took place, identify all individuals that were present and set forth the sum and substance of the discussions or communications. If such communication was in writing, attach a copy to your response to this Interrogatory.

This Defendant is not aware of any such discussion or communication.

21. Were there any oral discussions or communications between any of the Defendants, their attorneys, agents or employees, and Eugene and Agnes E. Meyer Foundation, its agents, employees, or attorneys concerning or relating to Oregon Road? If so, identify the individuals involved, the date the communications or discussions took place, identify all individuals that were present and set forth the sum and substance of the discussions or communications. If such communication was in writing, attach a copy to your response to this Interrogatory.

This Defendant is not aware of any such discussion or communication.

22. Has there ever been any agreement(s) between any of the Defendants, including but not limited to any agreements concerning or related to payment of legal fees, expenses, costs or disbursements with respect to this court action?

The Defendant objects to this request on the grounds that it calls for the production of information which is neither relevant nor reasonably calculated to lead to the discovery of relevant information or admissible evidence. Without waiving said objections, the Defendant answers as follows:

As a result of the appeal on the Seven Springs case, the Defendant / Appellants were directed to pay the Plaintiff / Respondent's costs associated with the appeal. This was ordered by the Appellate Division in its February 13, 2008 decision. The entire cost to be paid was $5,904.83. The Town Board of the Town of North Castle voted to pay the individual Defendants' (Donohoe and Burke) share.

Therefore, the Town of North Castle paid $3,936.56 payable to the order of "Seven Springs, LLC."

Additionally, the Town of North Castle paid for the individual Defendants' share of the transcript cost for the Court appearance on March 27, 2008 in the amount of $325.00.

23. If the Answer to Interrogatory No. 22 is anything other than an unqualified "no:"

a. State the date when and the place where the "agreement" was made;

The Town Board authorized the Town of North Castle finance department to issue a check to pay for the cost of the individual defendants' portion of the appeal and the transcript in or about February or March 2008.

b. State the names of the individuals by whom on behalf of the respective parties it was made;

Mr. and Mrs. Donohoe and Mrs. and Mrs. Burke.

c. State who was present at its making;

Members of the Town Board of the Town of North Castle and the Town's consultants.

d. State if it was written or oral;

Both.

e. If it was written or partially written, identify such written document(s);

The Town's agreement would be reflected in the minutes of the Town Board if it took place at a public hearing. The agreement is otherwise reflected in correspondence from the Town Attorney's office enclosing payments.

f. If it was oral or partially oral, identify such oral agreement(s) and state each and every term, condition and provision thereof; and

N/A

g. If any payments have been made for or on behalf of any of the defendants, identify who made the payment(s), and the payment date, payee and amount.

Town of North Castle issued a check on March 10, 2008 in the amount of $3,936.56 payable to the order of "Seven Springs, LLC."

Town of North Castle issued a check on March 27, 2008 in the amount of $750.00 payable to the order of "Howard Breshin."

24. State whether or not the parties conducted any negotiations or had any communications in connection with the agreement referred to in Interrogatory Number 22 above, and if they did:

Once authorized, the Town Attorney for the Town of North Castle informed counsel for the individual Defendants that their portions of the costs would be paid by the Town.

a. State the date when and the place where the negotiations or communications took place;

Exact date unknown; in or about March 2008. Emails were sent between Stephens Baroni Reilly & Lewis and Oxman, Tulis, Kirkpatrick, Whyatt & Geiger regarding the Town's offer to pay.

b. State who was present when the negotiations and communications took place;

In or about March 2008. Emails were sent between Stephens Baroni Reilly & Lewis and Oxman, Tulis, Kirkpatrick, Whyatt & Geiger regarding the Town's offer to pay.

c. State whether the negotiations and communications were written or oral;

Written.

d. If the negotiations or communications were written or partially written, identify such written document(s); and

In or about March 2008. Emails were sent between Stephens Baroni Reilly & Lewis and Oxman, Tulis, Kirkpatrick, Whyatt & Geiger regarding the Town's offer to pay.

e. If the negotiations or communications were oral or partially oral, identify such oral agreement(s) and state each and every term, condition and provision thereof.

N/A

23. *[SIC]* Identify all documents, including but not limited to, memoranda, notes, correspondence, statements, books, journals, worksheets, ledgers, faxes, telegrams, charts, records of meetings, e-mails, telephone logs or other communications identified in response to the requests above (whether handwritten, taped, computerized, photo or carbon copies or otherwise), and produce true and complete copies of each document.

See copy of checks annexed hereto. See also documents previously produced in response to Plaintiff's Combined Document Demand.

24. [SIC] Identify all persons who supplied any information used to prepare each Defendant's responses hereto and for each such person identify the information supplied or attach a copy thereof to your responses to these interrogatories.

Records from the Town Hall, Town of North Castle and the files of Stephens, Baroni, Reilly & Lewis were used to prepare these responses.

Dated: January 16, 2009
White Plains, New York

Yours, etc.

STEPHENS, BARONI, REILLY & LEWIS, LLP

By: Kristen L. Cinque, Esq.
Attorneys for Defendant, Town of North Castle
Northcourt Building
175 Main Street, Suite 800
White Plains, NY 10601
(914) 761-0300

To:
DelBello, Donnellan, Weingarten, Wise & Wiederkehr, LLP
ATTN: Mr. Bradley Wank, Esq.
Attorneys for Plaintiff
One North Lexington Avenue
White Plains, New York 10601

Benowich, LLP
ATTN: Mr. Len Benowich, Esq.
Attorneys for the Nature Conservancy
1025 Westchester Avenue
White Plains, New York 10604

Oxman, Tulis, Kirkpatrick, Whyatt & Geiger
ATTN: Ms. Lois Rosen, Esq.
Attorneys for Mr. & Mrs. Burke
and Mr. & Mrs. Donohoe
120 Bloomingdale Road
White Plains, New York 10601

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

SEVEN SPRINGS, LLC,

Plaintiff,

- against -

AFFIDAVIT OF SERVICE

Index No.: 9130/06

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

----------X

STATE OF NEW YORK)
: ss.
COUNTY OF WESTCHESTER)

KRISTEN L. CINQUE, being duly sworn, deposes and says:

I am not a party to the action, am over 18 years of age, and reside in Middletown, New York.

On May 12, 2009, I served a true copy of the Defendant, Town of North Castle's Reply Affirmation together with the exhibits annexed thereto by hand delivering same to the last known address of the addressees. Said delivery was made prior 12:00 p.m to the last known address of the addressees as set forth below:

Benowich Law, LLP
ATTN: Mr. Leonard Benowich, Esq.
1025 Westchester Avenue
White Plains, New York 10604

Oxman, Tulis, Kirkpatrick, Whyatt & Geiger
ATTN: Mr. John Kirkpatrick, Esq.
120 Bloomingdale Road
White Plains, New York 10601

DelBello, Donnellan, Weingarten, Wise & Wiederkehr, LLP
ATTN: Mr. Bradley D. Wank, Esq.
One North Lexington Avenue
White Plains, New York 10601

Sworn to before me this
12th day of May, 2009

Wendy Federici
Notary Public

WENDY FEDERICI
Notary Public, State Of New York
No. 4866147
Qualified In Westchester County
Commission Expires July 28, 2010

KRISTEN L. CINQUE

STEPHENS, BARONI, REILLY & LEWIS, LLP
ATTORNEYS AND COUNSELORS AT LAW

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SERVICE NOT ACCEPTED
BY FAX OR E-MAIL

May 12, 2009

Via Hand Delivery
Benowich Law, LLP
ATTN: Mr. Leonard Benowich, Esq.
Attorneys for the Nature Conservancy
1025 Westchester Avenue
White Plains, New York 10604

RECEIVED
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CHIEF CLERK
WESTCHESTER SUPREME
AND COUNTY COURTS

Oxman, Tulis, Kirkpatrick, Whyatt & Geiger
ATTN: Mr. John Kirkpatrick, Esq.
Attorneys for Mr. & Mrs. Burke
and Mr. & Mrs. Donohoe
120 Bloomingdale Road
White Plains, New York 10601

DelBello, Donnellan, Weingarten, Wise & Wiederkehr, LLP
ATTN: Mr. Bradley D. Wank, Esq.
Attorneys for Plaintiff
One North Lexington Avenue
White Plains, New York 10601

RE: *Seven Springs LLC v. The Nature Conservancy, et al.*
Index No.: 9130/06

Dear Counselors:

Enclosed, please find the Defendant, Town of North Castle's Reply for service upon you.

I trust all is self-explanatory.

Very truly yours,

Kristen L. Cinque

KLC/kc
Enclosure

CC: Hon. Rory J. Bellantoni

Index No. 9130/06 *Year 20*

SEVEN SPRINGS, LLC,

Plaintiff,

- against -

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

AFFIRMATION IN REPLY

Attorneys for **STEPHENS, BARONI, REILLY & LEWIS, LLP**
DEFENDANT, TOWN OF NORTH CASTLE

NORTHCOURT BUILDING
175 MAIN STREET, SUITE 800
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(914) 761-0300

Pursuant to 22 NYCRR 130-1.1-a, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, (1) the contentions contained in the annexed document are not frivolous and that (2) if the annexed document is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom and that (ii) if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYCRR 1200.41-a.

Dated: ..... Signature .....

Print Signer's Name.....

Service of a copy of the within *is hereby admitted.*

Dated:

.....
Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within-named Court on* *20*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon.* *, one of the judges of the within-named Court, at on* *20* *, at* *M.*

Dated:

STEPHENS, BARONI, REILLY & LEWIS, LLP

Attorneys for

To:

NORTHCOURT BUILDING
175 MAIN STREET, SUITE 800
WHITE PLAINS, NEW YORK 10601

Attorney(s) for

STATE OF NEW YORK, COUNTY OF ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York, and

Check Applicable Box

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following.

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.
Dated: .....

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:
being sworn says: I am

Check Applicable Box

☐ Individual Verification — in the action herein; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 20 .....

(Print signer's name below signature)

.....

STATE OF NEW YORK, COUNTY OF ss:
being sworn says: I am not a party to the action, am over 18 years of age and reside at

On , 20 , I served a true copy of the annexed in the following manner:

Check Applicable Box

☐ Service by Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service, addressed to the address of the addressee(s) indicated below, which has been designated for service by the addressee(s) or, if no such address has been designated, is the last-known address of the addressee(s):

☐ Personal Service — by delivering the same personally to the persons at the address indicated below:

☐ Service by Facsimile — by transmitting the same to the attorney by facsimile transmission to the facsimile telephone number designated by the attorney for that purpose. In doing so, I received a signal from the equipment of the attorney served indicating that the transmission was received, and mailed a copy of same to that attorney, in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service, addressed to the address of the addressee(s) as indicated below, which has been designated for service by the addressee(s) or, if no such address has been designated, is the last-known address of the addressee(s):

☐ Service by Electronic Means — by transmitting the same to the attorney by electronic means upon the party's written consent. In doing so, I indicated in the subject matter heading that the matter being transmitted electronically is related to a court proceeding:

☐ Overnight Delivery Service — by depositing the same with an overnight delivery service in a wrapper properly addressed, the address having been designated by the addressee(s) for that purpose or, if none is designated, to the last-known address of addressee(s). Said delivery was made prior to the latest time designated by the overnight delivery service for overnight delivery. The address and delivery service are indicated below:

Sworn to before me on , 20

.....

.....

(Print signer's name below signature)